Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PETER HELLAND,
Plaintiff-Petitioner

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Prohibiting Public School Teachers from Carrying Their Bible to School, and Prohibiting Teachers from Silently Reading the Bible During Silent Reading Periods, Violates the Teachers' Free Exercise of Religion and the Religious Freedom Restoration Act, or Is Required by the Establishment Clause?

II. Whether Firing Public School Teachers in Whole or in Part for Carrying Their Bible to School, or for Silently Reading the Bible During Silent Reading Periods, or Prohibiting Either Religious Practice, Is Religious Discrimination in Employment or Is a Legitimate Nondiscriminatory Reason, When Teachers Are Allowed To Carry Other Books and To Read Other Books in the Classroom?

III. Whether Prohibiting a Public School Teacher from Briefly Responding to Specific, Voluntary, Student-Initiated Questions on Subjects Touching on Religious Matters Raised During the Presentation of School-Approved Curriculum Violates the Teacher's Academic Freedom.

IV. Whether Firing a Public School Teacher in Whole or in Part for Briefly Responding to Specific, Voluntary, Student-Initiated Questions on Subjects Touching on Religious Matters Raised During the Presentation of School-Approved Curriculum, or Prohibiting That Practice, Is Religious Discrimination in Employment, When Teachers Are Allowed to Respond to Specific, Voluntary, Student-Initiated Questions on Subjects Touching on Non-Religious Matters During Such Presentations?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff-petitioner Peter Helland and the defendant-respondents South Bend Community School Corporation.

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INTRODUCTION

This case raises significant issues of the extent to which public school teachers may be deprived of their religious freedom and academic freedom rights in the classrooms, and to which religious must be treated as a dangerous toxic contaminant in our nation's primary and secondary public schools.

The courts of the Northern District of Indiana and the Seventh Circuit have held that public schools may prohibit, under penalty of termination, teachers from carrying their Bibles to school, or silently reading their Bibles at their desks during silent reading periods, or honestly answering specific, voluntary, student-initiated questions touching on religious matters as they teach school-approved curriculum. In doing so, the lower courts' decisions conflict with this Court's religious freedom decisions in, among others, *Abington v. Schempp*, with the Religious Freedom Restoration Act, with this Court's academic freedom decisions in, among others, *Pickering v. Board of Education* and *Tinker v. Des Moines School District*, and with this Court's employment discrimination decisions in, among others, *McDonnell Douglas Corp v. Green*.

OPINION BELOW

The opinion (Appendix A) is reported at 93 F.3d 327 (7th Cir 1996).

JURISDICTION

Federal jurisdiction exists under 28 U.S.C. §1331. The Seventh Circuit entered its opinion August 15, 1996. This Court's jurisdiction is under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the First and Fourteenth Amendments, the Religious Freedom Restoration Act (42 U.S.C. §2000bb), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§1983, 2000e). These statutes are quoted in Appendix B.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS.

Peter Helland, a long-time substitute teacher for the South Bend Community School Corporation ("Corporation"), filed this suit for religious freedom and against religious discrimination in employment in the Northern District of Indiana on October 28, 1994. The Corporation is the sole defendant. The trial court dismissed Mr. Helland's religious freedom and religious discrimination in employment claims on motion for summary judgment by written order dated December 7, 1995. The Seventh Circuit affirmed this decision on both claims by published opinion decided August 15, 1996.

B. STATEMENT OF THE FACTS.

1. The Corporation's Termination of Mr. Helland.

The Corporation fired Mr. Helland, a substitute teacher, because he carried his Bible into the classroom, because he silently read it during classroom silent reading periods, and because he honestly though briefly responded to specific, voluntary, student-initiated questions touching on religion when he taught curriculum approved by the school (Ex. V "termination letter" (Appendix C)). While the school has haphazardly and largely post-hoc attempted to develop a paper trail justifying its actions on other grounds (purported "consistent" poor performance as a substitute teacher, persistent proselytizing, reading

of religious books to students and distribution of religious materials to students (Exs. R, V)), the facts are otherwise.

The Corporation stated its reasons for firing Mr. Helland, in its termination lett r (Nov. 10, 1993) and in the contemporaneous October memorandum (Oct. 29, 1993) (Appendix C):

> "you had brought a bible into the classroom"
> "your discussion of religion and evolutionary theories"
>
> "Mr. Helland had brought a bible into the classroom"
> "Mr. Helland allowed himself to get into a discussion of religion and evolutionary theories"

These reasons and other pretextual reasons are discussed in Section 3.

2. The Seventh Circuit Gloss on the Reasons for Termination.

The Seventh Circuit opinion does not accurately recite the facts of the case. Even its scathing list of bad acts is a post-firing list of things that are not true generally, were never deemed important enough to fire Mr. Helland or even to mention to Mr. Helland before his firing, and that he was never given an opportunity to explain or correct until after he filed a complaint with the EEOC and was fired (Aff. ¶¶ 8, 26, Exs. W, Y, EE, FF).

The court portrayed Mr. Helland as incompetent even though he enjoyed the benefit of a lengthy list of positive teacher evaluations covering the times he had substituted over the course of nine years in most of the Corporation's 35 different elementary, middle and high schools. The opinion states that "several principals and teachers for whom he had substituted submitted negative evaluations of Helland's performance." Mr.

Helland taught a total of 720 times (Ex. LL). The Corporation requires the regular teacher of the class to complete a short, written critique on the performance of the substitute, which is to be reviewed by the principal (Exs. DD, 7). [1] The record contains examples of some of the overwhelming majority of positive critiques Mr. Helland enjoyed (Ex. II). The Corporation produced only seven critiques with negative comments, and a scarce handful of three other documents criticizing Mr. Helland's performance as a substitute teacher (Exs. B, D-O). The Corporation refused to produce the 713 positive evaluations. The negative evaluations were a scant 1% of the total number of evaluations (seven out of 720), and the Corporation had never notified Mr. Helland of the results of any of these evaluations until after Mr. Helland filed his EEOC complaint. Mr. Helland never had the opportunity to respond to what may have been misunderstandings or unjust criticisms (Aff. ¶¶ 8, 26). The opinion further claimed that those "several principals and teachers . . . requested that he not return to their schools or classrooms." In fact, of the few such requests, one teacher specifically stated that Mr. Helland "can be sent for others" (Ex. D) and a second now supports Mr. Helland (Exs. G, 9).

The Seventh Circuit opinion alleged that "[t]he evaluations indicated that Helland failed to follow lesson plans left for him by the teachers for whom he substituted." That criticism occurred in only 5 of the 720 evluations (Exs. H, I, K, M, N), and in only one did the teacher explain this statement with any specificity (Ex. I). In this instance, the teacher of a class of honor students stated "Sub did little to no explanation of the lessons provided." Mr. Helland did, in fact, attempt to explain the material, but the students insisted that they did not want him to do this (Aff. ¶ 17). Because the honor students were capable

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[1] The Corporation also requires the substitute to prepare a written report for each day (Ex. DD). Mr. Helland prepared these reports as required. (Aff. ¶ 6.)

of completing the assignments without a comprehensive explanation, Mr. Helland gave them the assignments and invited them to bring any specific questions they had to his desk. In another instance several students of one of these teachers disputed her conclusion (Ex. S). There, a German teacher, one of the teachers who had requested that Mr. Helland no longer substitute for her (Ex. H) later reported to her principal that "many students complained when I had him as a substitute" (Ex. S). However, several students in the class said that Mr. Helland gave out the assignments left by the teacher and treated them much like any other substitute would have (Ex. S).

The Seventh Circuit opinion also claimed that "he failed to maintain control of his classes." That criticism occurred in only 5 of the 720 evaluations (Exs. D, E, H, J, N). Three others lately relied on by the Corporation, as well as the several examples of the 713 positive evaluations, rate his performance here as at least satisfactory (Exs. F, I, M, II). The Corporation's own substitute teachers' handbook extensively recognizes the difficult position substitute teachers often face in the area of classroom discipline and management (Ex. DD).[2] At one point the handbook instructs the substitute that "[i]f nothing has blown up in the room that day, including you, thank the teacher for a nice day and a super bunch of youngsters" (Ex. DD p 15).

The Seventh Circuit also portrayed Mr. Helland as irresponsible, though as with the negative evaluations, none of the school's allegations in this area was brought to his attention before he filed his EEOC ac-

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[2]Guidance on how to handle classroom discipline and uncooperative or unruly students occurs throughout the last half of the handbook (Ex. DD pp 10-16). It includes seven rules of discipline (Ex. DD pp 10-11), a list titled "CLASSROOM DISCIPLINE: A Dozen Guides for Survival" (Ex. DD pp 12-13) and various miscellaneous rules on classroom and hallway behavior.

tion and then was fired (Aff. ¶¶ 8, 26). The Court referred to a single occasion when "[o]ne teacher complained that Helland drank a non-alcoholic beer in class, and that the students believed it was alcoholic." Mr. Helland suffers from hypoglycemia and cannot drink most regular soft drinks. He had prepared his lunch that morning not knowing he would be required to eat lunch with his students (Aff. ¶ 18). It was not until he arrived at school that day that he learned he was assigned to a special education class and would be required to stay with them during lunch (Aff. ¶ 18). The opinion also said that "[t]wo teachers commented on Helland's lack of understanding of high school students." The only example given was "an incident where Helland gave his car keys to a student who had been suspended from school grounds," which, as usual, was never mentioned to Mr. Helland until he was fired (Aff. ¶¶ 8, 26). An accurate understanding of this event would show that Mr. Helland opens his home as a house for troubled boys to live in (Ex. 17), because of his deep care for youths, and one of those youths was waiting on him for a ride home after school that day. Mr. Helland gave him the car keys to allow him to unlock the car to sit in it listening to the radio, until Mr. Helland could take him home. He was not aware at that time that the boy had been suspended that day. One of the teachers who made that report now disagrees with his earlier assessment of that situation (Ex. 9).

The Seventh Circuit then portrayed Mr. Helland as a religious zealot, using the usual epithets of proselytization, Bible reading, and creationism. It states "[i]n addition, several teachers complained that Helland proselytized in his classes by reading the Bible aloud to middle and high school students." Reading the Bible aloud occurred once, seven years before the school fired him, when several students in one of his classes begged him all day to read them something from his Bible (Aff. ¶ 12). As a reward for the class' good behavior, he randomly read three verses out loud at the end of the day (Aff. ¶ 12). After the Corporation told him this was inappropriate, he never again read his

Bible out loud in class (Aff. ¶ 12).[3] There was no proselytizing. The opinion further alleges that he was "distributing Biblical pamphlets." The Corporation accused Mr. Helland of distributing what were called "Jesus Newspapers" in the classroom at Adams High School (Ex. T). Mr. Helland never distributed these pamphlets to any of the students at Adams, much less to any other student, and in fact had not substitute taught at Adams High School for over six months before the date the Corporation stamped on the pamphlet (Aff. ¶¶ 28-29, 34, Exs. LL, T). Thus, Mr. Helland could not have distributed the pamphlet while teaching. The person who was distributing those pamphlets confirmed that Mr. Helland had nothing to do with their distribution at Adams High School (Ex. 5). When Mr. Helland tried to explain this to the Corporation during the December 3 phone conversation, the Corporation's representative told him *"you may be innocent, but I can not risk the possibility that you may be breaking some law"* (Aff. ¶ 29, Ex. Y)![4]

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[3]The record contains three critiques that allege Mr. Helland read his Bible to his students in the classroom (Exs. B, E, F). Mr. Helland agrees he did do this with three verses on the one occasion in the fall of 1986 (at the students' insistence), but that he had never done it before and never did it after (Aff. ¶ 12). As with this situation, Mr. Helland has always sought to fully comply with the directives of the Corporation concerning his performance as a substitute teacher (Ex. W). On the days of two of the alleged occasions of Bible reading, he was not even at the school in question (Aff. ¶¶ 13, 14). Such date conflicts in the Corporation's records have occurred with disturbing regularity in this case (compare Ex. LL with Exs. K-M and notes in Aff. ¶ 19), and show its claims to be pretextual.

[4]In 1979, during one of Mr. Helland's first substitute teaching assignments for the Corporation, he had offered one copy of one short religious booklet to one student in an attempt to occupy the time of this particularly disruptive and uncooperative student (Aff.

The opinion also claims that he "profess[ed] his belief in the Biblical version of creation in a fifth grade science class." In fact, on the day in question, Mr. Helland was teaching on the theory of evolution and had consciously avoided a presentation on any other specific religious or scientific theory of origins (Aff. ¶ 37, Exs. U, W, FF). A student became disturbed with the thought that "he came from a monkey," and blurted out that he did not want to talk about evolution anymore (Aff. ¶ 37, Ex. W). Mr. Helland, wanting to console the boy, told him that the theory of evolution is only a theory and that he himself believed instead in the theory of creation (Aff. ¶ 37, Ex. W).[5] In doing so he fully complied with the substitute teachers' handbook which directs teachers to "[a]nswer questions to the best of your ability" and "[b]e honest if you don't know an answer, but try to find the best response by the end of the day" (Ex. DD at 15).

¶ 9, Exs. B, PP). The student, initially interested, returned the booklet at Mr. Helland's insistence within a few minutes because Mr. Helland came to believe that giving it to him was a mistake (Aff. ¶ 9, Ex. PP). He never repeated this activity (Exs. PP, Y). As with everything else, the Corporation never showed him this negative critique despite its own policy and Mr. Helland did not learn it existed until he initiated a review of his file (Aff. ¶ 9). This event and all of Mr. Helland's actions surrounding it occurred over 14 years and about 700 substitute assignments before the Corporation fired him.

[5] Several other students had earlier in the class volunteered that they believed that God created the universe (Aff. ¶ 37). The irony is that Mr. Helland strictly limited his science presentation to the theory of evolution, and has now been fired in part because he did not respond to a student's specific disagreement with that theory by insisting that any theory or belief contrary to evolution must be wrong.

Finally, the opinion claims that "Helland agreed not to give the students an assignment if they agreed not to tell anyone about the discussion." Following his effort to ease the boy's distress, Mr. Helland told the class that he could not teach the theory of creation in the public schools, and that they should not think he was trying to teach religion because he would not and could not teach religious beliefs that disagree with the theory of evolution (Aff. ¶ 37, Ex. W). The entire exchange took two or three minutes and did not disrupt the learning atmosphere of the classroom (Aff. ¶ 41). Afterward, several students in the class began to tease him, saying they wouldn't tell on him if he agreed to not give them an assignment (Aff. ¶ 37, Ex. W). Since it was Friday and no assignment had been left, he humored them, saying "ok" and explaining the real reason - it was Friday and no assignment had been left (Aff. ¶ 38). Mr. Helland often could connect with his students in ways they appreciated (Exs. S, 16, 24). The substitute teachers' handbook encouraged him to do this, directing him to "Be nice. Smile. Win them over . . . . Risk sharing that you are human" (Ex. DD p 12).

The Seventh Circuit also found numerous warnings that did not exist. "The School Corporation warned Helland numerous times that his poor performance as a substitute and his improper interjection of religion into the classroom were grounds for removing him from the substitute teacher list." There were no such "numerous" warnings. Only once, in a discussion recorded in the December memo, did the school make anything like a "warning" to Mr. Helland before he filed his EEOC complaint (Ex. P). Even then, the Corporation made no mention of alleged poor performance (Exs. Y, EE, FF). The second and only other communication on any of these issues came in the form of the May letter, and came only after Mr. Helland filed an EEOC complaint and the Corporation brought in its lawyers--and after Mr. Helland had begged the school for months to talk with him about these issues and had been forced to file the EEOC complaint (Aff. ¶ 30). In the end, the court

simply overlooked the first paragraph of the termination letter (which closely tracked the October memo). Not a single act of alleged failures to follow lesson plans or problems with classroom management surfaced between the parties until after Mr. Helland made his EEOC complaint (Aff. ¶ 8, Exs. W, Y, EE), and none occurred between the time of the May letter and the termination letter.

3. The Corporation's Reasons for Termination.

The Corporation stated its reasons for firing Mr. Helland, in its November 10, 1993 termination letter:

> This decision was made after our office was notified by the Principal of Tarkington Elementary School of your substitute teaching experience at Tarkington Elementary School on Friday, October 29, 1993. It was reported to us that students in the fifth grade were upset because of your *discussion of religion and evolutionary theories.* Also, a teacher at Tarkington reported to the principal that *you had brought a bible into the classroom* (Ex. V) (emphasis added).

This termination letter was prompted by the October memorandum from the principal, dated about October 29, 1993 ("October memorandum") (Ex. U):

> Quite a stir was caused due to fact that Mr. Helland *allowed himself to get into a discussion of religion and evolutionary theories.* Some students were upset by this discussion and came to me with the issue. After school I spoke with Mr. Helland about what had been reported to me. He explained that the discussion had occurred during science class, and he was attempting to explain the evolving of man in relation to the dinosaur era. A teacher reported that Mr. Helland had *brought a bible into the classroom.* When asked about it he stated that "he was a Gideon, and therefore must have his Bible with him at all times." I explained

> to him that religion is not taught in our schools (Ex. U).

The October memorandum was otherwise silent as to Mr. Helland's performance as a substitute teacher. The termination letter was carefully massaged to give pretexts for termination, though to the extent of sketchy facts it referred to incidents many years before that had not been grounds for termination, and otherwise it gave no specifics and was mistaken in its generalities (as discussed below). Prior to the termination letter and October memo, the Corporation had only once raised the issue of poor performance and had only twice raised the issue of injection of religion in the classroom, and at neither time was Mr. Helland given any chance to discuss the specific allegations raised (First Affidavit of Peter Helland ("Aff.") ¶¶ 30-31, Exs. W, Y, EE). In most cases, the alleged incidents never occurred (See e.g. - Aff. ¶¶ 13, 14). The first such communication, described in an interoffice memorandum memorializing a meeting Mr. Helland obtained with a school official on December 3, 1992 ("December memo"), states:

> I talked with Mr. Helland today and explained our concern about passing out religious material, *reading the Bible in the classroom to* (Ex. R).

This December memorandum is otherwise silent as to Mr. Helland's performance as a substitute teacher.[6] The second communication, a May 20, 1993 letter ("May letter"), was prepared in retaliation only after Mr. Helland was forced to initiate an EEOC Charge of Discrimi-

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[6] In the termination letter the Corporation states it informed Mr. Helland of his poor performance reviews during this December 3, 1992 meeting. The December memo is conspicuously bereft of such information, and Mr. Helland specifically refutes that the Corporation informed him of any instances of alleged poor performance at that meeting (Exs. Y, EE, FF).

nation (Ex. R, Y), and is the only piece of correspondence the Corporation provided to Mr. Helland on the matter before the termination letter.[7] This letter states falsely that Mr. Helland had "consistently received poor performance reviews" and "on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation" (Ex. R).[8] The Corporation did not find any infractions worthy of terminating Mr. Helland, informing him that he "continue[s] to be on the substitute list" (Ex. R). The October memorandum describes the only actions Mr. Helland actually did that the Corporation found offensive from the time of the May letter, when the Corporation confirmed that he still had his job, until the time the Corporation fired him.

4. Mr. Helland's Qualifications and Performance as a Teacher.

Mr. Helland in fact little resembles the contorted portrait painted by the Corporation and embellished in

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[7] After many months and much effort, Mr. Helland sought and obtained a meeting with the Corporation on April 14, 1993 to learn what complaint had precipitated his dismissal from one of the schools within the Corporation and to discuss his alleged improper religious activities (Aff. ¶¶ 30-31, Ex. W). Unfortunately, "nothing significant regarding these matters was discussed" (Exs. W, 3). The Corporation reneged on its promise to address these issues by letter within the next three or four days (Ex. W). In its response, the May letter, over a month late and prepared only after Mr. Helland filed a claim with the EEOC, the Corporation for the first time accused him of poor performance (Ex. W).

[8] A few months earlier the Corporation it had taken the opposite position on Mr. Helland's performance (Ex. FF). In any event, the Corporation's failure to notify him when notes and records critical of his performance were placed in the file violated the official policy of the Corporation (Ex. 11).

the Seventh Circuit's opinion. He earned a B.A. from the University of Notre Dame in 1978, majoring in German (Ex. C). He substitute taught at almost every one of the Corporation's 35 elementary, middle and high schools over a span over nine years (Ex. LL). Many students knew him as a "gentle and quiet man" who "knows me by my first name" and "always says 'Hi' to me in the hallway" (Ex. S). Other students realized he cared about them both in and out of class (e.g. - Ex. 16) and could "relate to all walks of life rich and poor" (Ex. 24). One student even described him as "the perfect teacher" (Ex. 16). His colleagues also admired his commitment to his students. Of the 720 times he substituted, nearly all teachers at all schools approved of his classroom performance and only a handful (barely 1%) ever criticized his performance. Some criticism would be expected by any substitute teacher, because misunderstandings occur at least 1% of the time. Of the few critics, most still had positive things to say about his performance (Exs. B, D-F, I-J, M-N). One teacher who had earlier criticized his handling of a situation with a student has now concluded that the Corporation "was [not] treating Mr. Helland fairly" (Ex. 9). By way of further example, one principal has stated that Mr. Helland always "performed in a satisfactory manner" (Ex. II) and a high school department head noted he has always "fulfilled his responsibilities in a competent manner" (Ex. 8). The security guard at one middle school described him as "one of our better subs" (Ex. 6).

Outside of his school duties, Mr. Helland regularly visits prisoners in the local jail and takes troubled youths off the streets and into his home (Exs. W, 12, 17). It would not be unusual to find him playing basketball down the block with some of his students after school. Substitute teaching has been his primary source of income, allowing him to subsist within a very modest lifestyle (no more than a few thousand dollars a year (Ex. RR)) while pursuing his volunteer community activities.

5. Mr. Helland's Quiet Religious Convictions.

Mr. Helland's primary motivation in life is his religious faith (Aff. ¶ 3). As part of his faith he often takes time to read his Bible silently, including in the classrooms of public schools during silent work periods (Aff. ¶ 3). Except for the two early isolated events described above (once reading the Bible to students at their insistence in 1986, and once handing a religious booklet to a disruptive and uncooperative student for a few minutes in 1979) which obviously did not cause his termination 7-14 years later, he has purposefully never read religious books as part of his classroom presentation, has not proselytized or otherwise initiated religious discussions in the classroom, and has not distributed religious materials to students in the classroom, all because he sought to comply with what he understood to be the Corporation's policy (Aff. ¶¶ 4, 12).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS, AND WITH THE RELIGION CLAUSES AND THE RELIGIOUS FREEDOM RESTORATION ACT, IN FINDING THAT TEACHERS WHO MERELY CARRY THEIR BIBLE TO SCHOOL, OR SILENTLY READ THE BIBLE DURING SILENT READING PERIODS, VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This Court has applied these religious liberty clauses to the states through the Fourteenth Amendment.

A. Teachers Do Not Shed Their Constitutional Rights To Silently Practice Their Religion When They Enter The Classroom.

"It can hardly be argued either that students or teachers shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506 (1969). The School Corporation conceded that Mr. Helland has a sincere religious belief in carrying his Bible and reading his Bible silently.[9] His silently reading a religious book at his desk, during silent reading time for students, is not a religious exercise for the students, though it is for Mr. Helland. The Religious Freedom Restoration Act, 42 U.S.C. §2000bb, requires the Corporation to permit Mr. Helland's religious exercise unless it can identify a compelling government interest.

The only compelling interest the Corporation has asserted is that to allow Mr. Helland to silently read a religious book during silent work periods in the classroom would be an establishment of religion prohibited by the First Amendment. Mr. Helland does not dispute that preventing an establishment of religion is a compelling interest, but has never conceded that his silently carrying his Bible or silently reading it during reading periods is an establishment of religion or something that there is a compelling interest to censor.

The Seventh Circuit incorrectly concluded on this record that silent Bible reading during silent work periods may "inculcate religion," because requiring the Corporation to accommodate this does not endorse, coerce, advance or entangle the school with religion -- the students did not participate and had no reason to believe they should. Further, such innocuous activity

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[9] The Corporation concedes that its actions substantially burdened Mr. Helland's exercise of religion. Helland v. South Bend Community School Corp. 93 F.2d at 331.

does not rise to the level of "injection of religion in the classroom," *Helland*, 93 F.3d at 331, because nothing is injected and the teacher's constitutional right is to exercise his religion silently in this way. This Court has stated that the state should neither advance nor *inhibit* religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The Corporation did not find single instances in 1979 and 1986 to warrant termination until it searched for pretexts in 1993, and did not attempt to notify Mr. Helland of most alleged shortcomings until after its lawyers became involved when Mr. Helland was forced to file his EEOC complaint. The Corporation carefully preserved 7 negative evaluations, and carefully did not preserve the 713 favorable ones, and then carefully did not tell Mr. Helland of the negative ones to enable him to respond. The Corporation's position is epitomized by its statement that "you may be innocent, but I cannot risk the possibility that you may be breaking some law," on December 3, 1992.

B. A Bible May Be Brought Into Public School Classrooms, and Its Use Is Not Necessarily Inculcation of Religion in Students.

In *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963), this Court rejected the idea that public schools may prohibit all uses of religious books in the classroom when it said "the Bible is worthy of study for its literary and historic qualities." It confirmed this principle in *Stone v. Graham*, 449 U.S. 39, 42 (1980) by stating "the bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Certainly, these cases hold that the Establishment Clause prohibits the use of religious books for daily, ceremonial readings to students or the posting of religious texts for students to observe and contemplate.[10] The common thread in all of this Court's

[10] The Establishment Clause similarly prohibits other religious exercises in the classroom that compel

decisions on religious exercises in the classroom is that when the state compels participation by the students, the policy violates the Establishment Clause. However, this Court has taken the equally clear position that religious exercises, even when they occur in the classroom, do not infringe on others' rights provided education and exposure do not become advocacy or endorsement. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) ("[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (Canby, J., concurring) ("even the Bible may occupy a place in the classroom, provided education and exposure do not become advocacy."). Thus, public schools do not establish religion when they permit religious books in the classroom, absent a showing that such books are used to inculcate religion to the students.

The obvious point is that it must be constitutional to carry the Bible into the classroom, because otherwise it could not be "stud[ied] for its literary and historic qualities." It must be constitutional to read it silently by individual choice, because it is constitutional to read it aloud for certain nondevotional purposes.

The Seventh Circuit erroneously found that the Corporation did not fire Mr. Helland in part for his actions in carrying his Bible and reading it silently in the classroom, because the very first paragraph of the termination letter and the supporting October memorandum said the contrary.[11] The Corporation could

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student participation, such as daily prayer. Engel v. Vitale, 370 U.S. 421 (1962).

[11] It is important to note here that this case comes to the Court on grant of the Corporation's motion for summary judgment. As such, the lower courts erred in not viewing all evidence and reasonable inferences

not have been any clearer when it wrote "[t]his decision was made after . . . a teacher at Tarkington reported to the principal that you had brought a bible into the classroom." This was one of only two new facts recited by the Corporation in support of its decision to fire Mr. Helland (the other being a brief discussion prompted by a student question on religion and evolution in class). The only reasonable inference that can come from the termination letter is that the Corporation fired Mr. Helland in part because he "brought a bible into the classroom."[12]

The Seventh Circuit decision conflicts with other Circuits.[13] Its inclination to adopt the holding of

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therefrom in the light most favorable to the non-movant, in this case, Mr. Helland.

[12] Although not directly prompting the termination letter, the December memorandum "warned" Mr. Helland about "reading the Bible in the classroom to[o]." This of course referred to his silent reading of the Bible, because Mr. Helland had read the Bible aloud (three randomly chosen verses) to his students on one occasion in 1986, and never again. Even by the Corporation's suspect records, it had not accused him of doing this a second time after the three verses in 1987, over five years before it wrote this memorandum.

[13] *Cf. Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding a teacher may require choir students to participate in the singing of a religious theme song); *Grove*, 753 F.2d at 1534 (holding teachers may assign a book to students that comments on religion); *Florey v. Sioux Falls School Dist. 49-5*, 619 F.2d 1311 (8th Cir 1980) (holding religious materials may be used as a teaching resource), *with Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (holding a teacher may not silently read a religious book at his desk, or keep two religious books in his personal library for students to use voluntarily). Beyond the Seventh Circuit's conflict with this Court in the present case, the federal appeals circuits have split whether on the

Tenth Circuit in *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir 1990), also invites clear guidance from this Court to avoid unconstitutional constriction of teachers' First Amendment rights.

1. A Reasonable Observer Would Not Believe That Public Schools Endorse the Views of Teachers' Personal Reading Preferences.

The endorsement test was first adopted by Justice O'Connor, in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and by the Court in later cases. That test would "prohibit the government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 687. The endorsement test would not preclude government from acknowledging religion, *Wallace v. Jaffree*, 472 U.S. 38, 70 (O'Connor, J. concurring). Here, Mr. Helland asks no more of the Corporation than that they merely allow him to carry his Bible and silently read it in the classroom during silent work times. Doing so would not send a message to his students that they are either outsiders or insiders within the classroom, because a silent work period is not inherently religious and students need not compromise their beliefs to participate. *See Wallace*, 472 U.S. at 72 (O'Connor, J. concurring). They can work, read, study or even daydream and would not be the slightest bit exposed to the pages of Mr. Helland's Bible or the thoughts going through his head while he reads. They are quite clearly left with the choice of not participating in Mr. Helland's activity, and indeed, they are themselves probably busy with an assignment or engrossed in their own book and too busy to even know what the teacher is reading. Most importantly, there is no evidence in the record that any student

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issue of whether public school teachers may carry and read religious materials in the classroom. If the materials in *Doe*, *Grove* and *Florey* can be assigned to students, the teacher may certainly read such materials silently in the classroom.

ever participated in Mr. Helland's activity or felt even the slightest need to do so.

2. A Reasonable Dissenter Would Not Believe That Students Will Be Coerced to Conform to the Views of Teachers' Personal Reading Preferences.

In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court adopted the coercion test for graduation prayer cases. A public school may not "compel[] attendance and participation in an explicit religious exercise." *Lee*, 505 U.S. at 598. The Court stated an equally important rule:

> [a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. *See Abington School District, supra* at 306 (Goldberg, J., concurring). We recognize that, . . . throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public school and their students. *Lee*, 505 U.S. at 598-599.

This is that case. Mr. Helland merely wished to read his Bible, silently and to himself, while his students participate in an unquestionably valid silent work period. He has been fired in major part because he did so.

3. Public School Accommodation of Teachers' Personal Reading Preferences Has a Secular Purpose, Does Not Advance or Inhibit Religion, and Does Not Excessively Entangle the School with Religion.

As this Court stated in *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to

> worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

The *Lemon* test is met. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1973). The secular purpose of the silent reading or silent work period is unquestionably to promote the education of the students by having them perform class exercises in math, science, reading, etc. Mr. Helland's purpose in silently reading a religious book during these times is irrelevant because his activity does not require or even suggest the students must participate in it. The primary effect is equally unquestionable and equally irrelevant. Finally, public schools such as the Corporation retain the right to develop curriculum that includes religious materials, *Abington*, 374 U.S. at 203, and any entanglement concerns in the present situation (where the students do not participate) could be no greater than such concerns involving curriculum with religious content for students.

C. Discrimination against the Bible and Other Religious Books Would Violate the Religion Clauses; Because Teachers May Carry and Silently Read Other Books, Mr. Helland May Carry and Read the Bible.

Neutrality toward religion, and noninhibition of religion, must mean at least that if teachers can carry other books, they may carry the Bible. If teachers may read other books during silent reading periods, they may read the Bible. Any other view would select one book out of the world's libraries and ban it, quite discriminatorily in violation of the Fourteenth Amendment.

This Court's opinions have been misinterpreted to exclude all religion from the public square, even when

nonreligious opinion is allowed. Religion is not a radioactive contaminant that will harm all who pass nearby. Decisions that treat religion as a radioactive contaminant discriminate against one category of ideas and one form of discussion.

II. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN FINDING THAT FIRING TEACHERS FOR CARRYING THEIR BIBLE TO SCHOOL, OR SILENTLY READING THE BIBLE DURING SILENT READING PERIODS, IS LEGAL AND A LEGITIMATE NONDISCRIMINATORY REASON.

Title VII prohibits employers from discharging an employee because of his religion 42 U.S.C. §2000e-2. Mr. Helland does not shed his constitutional right to the free exercise of religion at the schoolhouse gate. He was discharged because

> "you had brought a bible into the classroom"
> "your discussion of religion and evolutionary theories"
>
> "Mr. Helland had brought a bible into the classroom"
> "Mr. Helland allowed himself to get into a discussion of religion and evolutionary theories"
>
> "reading the Bible in the classroom to[o]"

Mr. Helland proved a prima facie case of religious discrimination by showing that he was discharged for his religious exercise. It was not necessary for him to show an antireligious motivation, because an antireligious act occurred. His religious exercise was protected under the Constitution and the Religious Freedom Restoration Act. His dismissal on that basis was a religiously motivated, discriminatory reason prohibited by Title VII.

Consequently, the Corporation had the burden to

articulate a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It instead articulated that it fired Mr. Helland in part because he "brought a bible into the classroom," "allowed himself to get into a discussion of religion" by not shutting a student up when he asked a question, and was "reading the Bible in the classroom to[o]" (silently). Mr. Helland did not invade the rights of others, as stated in Section I of this brief, and the record contains no evidence that this activity materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.

This case bears a striking resemblance to *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995). There, the court held that a public employer, which fired an employee for engaging in religious practices at work (leading frequent spontaneous verbal prayers and quoting Bible passages at meetings), engaged in unlawful religious discrimination. 61 F.3d at 654. Here, of course, the religious practices were private in carrying a Bible and reading it silently.

III. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS BY FINDING THAT TEACHERS DO NOT HAVE THE ACADEMIC FREEDOM TO BRIEFLY RESPOND TO SPECIFIC, VOLUNTARY, STUDENT-INITIATED QUESTIONS ON SUBJECTS TOUCHING ON RELIGIOUS MATTERS DURING THE PRESENTATION OF SCHOOL-APPROVED CURRICULUM, BRIEFLY.

In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), this Court succinctly stated the rule on academic freedom:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees.

This Court has stated that public school teachers possess academic freedom within their classrooms, even in elementary schools, so long as the teachers' conduct does not materially and substantially interfere with the discipline and operation of the school, and so long as it does not invade the rights of others (such as by violating the Establishment Clause). *Tinker*, 393 U.S. at 513. Furthermore, "[i]t is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967).[14] A public school does not establish religion merely by religious ideas being mentioned in the classroom, particularly by student questions, unless the religious ideas are introduced by the teacher in order to inculcate religion in the students.

In the present case, the Corporation adopted and the Seventh Circuit approved a blanket prohibition against Mr. Helland discussing any subject touching on religion, even when such discussion was brief (two to three minutes) and was the result of a voluntary, student-initiated question during Mr. Helland's presentation of school-approved curriculum. The religious issue discussed was at once relevant to the subject matter, presented objectively, and resulted in no disruption in the classroom. Its censorship conflicts with the rules of academic freedom found in this

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[14] As Justice Stewart eloquently phrased it in a slightly different context than the present case:

> It is quite another thing for a State to make it a criminal offense for a public school teacher to so much as to mention the very existence of an entire system of respected human thought. *Epperson*, 393 U.S. at 116 (Stewart, J., concurring).

Court's opinions. This censorship of questions and answers in one subject, among the range of human knowledge, also conflicts with decisions in other circuits.[15]

A. Teachers Do Not Invade the Rights of Others When They Give Honest Answers to Students' Questions, and Acknowledge That Religion May Provide Legitimate Insight into Issues Raised By School Approved Curriculum.

The Corporation arbitrarily restricted Mr. Helland's academic freedom by firing him for briefly responding to a student question as he accurately taught the theory of evolution in a science class, when he honestly acknowledged that the student's expressed religious beliefs that support the theory of creation

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[15] *See Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987) (a teacher may lead a discussion involving religion); *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir 1980) (a teacher may not be fired for initiating classroom discussions on controversial topics); *James v. Board of education*, 641 F.2d 566 (2nd Cir 1972) (a teacher may state his personal views in the classroom while teaching); *Roman v. Appleby*, 558 F.Supp 449 (ED· PA 1983) (a school counselor may discuss potentially sensitive topics such as religion with students). *But cf. Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir 1994) (a teacher may not discuss religious beliefs with students during school time on school grounds). The current decision also conflicts with some of its own earlier statements. *See Zykan v. Warsaw Community School Corp.* 631 F.2d 1300, 1305-1306 (7th Cir. 1980) (acknowledging that school boards are not free to fire teachers for every random comment or from placing a flat prohibition on the mention of certain relevant topics in the classroom or from forbidding students to take an interest in subjects not directly covered by the regular curriculum).

can provide valid insight into the issues raised by the school-approved curriculum. This is true under any of the three tests which this Court has applied to Establishment Clause cases. Such activity did not endorse, coerce participation, advance or inhibit, or entangle the school with religion because it was relevant subject matter presented objectively and without disruption in the classroom. All student inquiries and responses during the brief discussion were voluntary and uncoerced. The situation was even less likely to create an Establishment Clause violation because the teacher did not raise the religious aspect of the discussion; the student did.

The Corporation's act of firing Mr. Helland, and the Seventh Circuit's approval, are nothing short of extraordinary given that broad latitude courts have given schools to advocate and even endorse activity as outrageous as sexually explicit, profane, and lewd language and activity during school time on school grounds. *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir 1995). It is an odd world when condom distribution in public schools is not thought to encourage promiscuous activity, but when student mention of religion in public schools is thought to risk permanent contamination of all hearers.

B. Such Acknowledgment Does Not Advance Religion Impermissibly and Does Not Necessarily Materially and Substantially Interfere With the Operation of Public Schools.

In the words of one circuit, "freedom of expression demands breathing room." *James*, 461 F.2d at 572. Clearly, the courts have given schools the general right to prescribe curriculum and the methods for teaching this curriculum, and teachers cannot assert a general right to control the scope of all activity in the classroom. This is not a case, and this is not a teacher, that raises these issues. But the Corporation crossed the line and invaded Mr. Helland's academic freedom when it fired him for doing nothing more than

briefly responding to a student's question while he taught school-approved curriculum. The record shows the ensuing discussion lasted no more than two or three minutes. The religious nature of the discussion was presented objectively, and Mr. Helland even qualified his comments by telling the students that he could not teach religion. The record also shows no disruption occurred in the classroom. Therefore, Mr. Helland stayed within his right to academic freedom.

C. It Is Discrimination To Hold that Teachers May Answer Any Student Questions unless They Touch on Religion, and May Acknowledge that Any Discipline May Provide Insight Except Religion.

A nondiscriminatory standard should apply to teacher answers to student questions. Either teachers should be forbidden to answer questions--a position that no one advocates--or teachers should be able to give honest answers to all questions including religious questions. Permission for teachers to answer any question except a religious one cannot be called anything but discriminatory, and it conveys the clear message that religion is more toxic than racism, vulgarity, flag burning, or hate crimes and must be buried in impervious caverns deep beneath the earth.

IV. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS BY FINDING THAT FIRING TEACHERS FOR BRIEFLY RESPONDING TO SPECIFIC, VOLUNTARY, STUDENT-INITIATED QUESTIONS ON SUBJECTS TOUCHING ON RELIGIOUS MATTERS DURING THE PRESENTATION OF SCHOOL-APPROVED CURRICULUM IS A LEGITIMATE, NONDISCRIMINATORY REASON.

Title VII prohibits employers from discharging an employee because of his religion 42 U.S.C. §2000e-2. Teachers retain the right to academic freedom and, indeed, such freedom would be worthless if it could be cut off inside the classroom, even the classroom in an

elementary school. *See Wieman v. UpDeGraff*, 344 U.S, 183, 196 (1952) (Frankfurter, J., concurring) ("[t]o regard teachers - in our entire educational system, *from the primary grades to the university* - as the priests of our democracy is therefore not to indulge in hyperbole." (emphasis added)).

When Mr. Helland proved his prima facie case of religious discrimination, the Corporation had the burden to articulate a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It has articulated that it fired Mr. Helland in part because he had a brief, student-initiated "discussion of religion and evolutionary theories" while he properly taught on the theory of evolution. Such activity is protected under the Constitution, and therefore discharge on that basis is a religiously discriminatory reason prohibited by Title VII. Mr. Helland did not invade the rights of others, for reasons stated in Section I of this petition.[16]

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[16]The lower courts viewed petitioner's employment discrimination claim primarily within the context of the pretext prong of the discrimination in employment test. On remand, this will be an issue; however, the Corporation clearly brought the issue of silent Bible reading and limited classroom discussions of religion into this case as a central part of its decision to fire Mr. Helland. Therefore, the courts incorrectly reached the pretext issue when it found the Corporation's reliance on these activities legitimate, nondiscriminatory justifications. It is worth noting here the Corporation's only other reason for firing Mr. Helland - poor performance. However, the negative critiques and comments, when placed within the context of over nine years of predominately satisfactory performance, and when explained and, in many cases, directly controverted in substance, create an insufficient basis for firing Mr. Helland apart from

CONCLUSION

Thus, we request that certiorari be granted.

Dated November 13, 1996 and respectfully submitted,

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the Corporation's predominant, religious and academic freedom discrimination justifications (silent reading of a religious book during silent reading periods and responding to specific, voluntary, student-initiated questions touching on religious matters).

A. SEVENTH CIRCUIT OPINION

No. 96-1079

PETER S. HELLAND,

Plaintiff-Appellant,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 94 C 852-Robert L. Miller, Jr., *Judge*.

ARGUED JUNE 6, 1996 - DECIDED AUGUST 15, 1996

Before BAUER, ROVNER, and DIANE P. WOOD, *Circuit Judges*.

BAUER, *Circuit Judge*. The South Bend Community School Corporation removed Peter Helland from its list of substitute teachers because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms. Helland believes that the School Corporation unlawfully dismissed him because of his religious beliefs, so he sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., 42 U.S.C. § 1983, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb. The district court granted. the School Corporation's motion for summary judgment, and we affirm.

BACKGROUND

Helland's Christian and Gideon beliefs require that he carry and read the Bible. From May 1979 to June 1980, and again from August 1985 to November 1993, Helland worked as a substitute teacher for the South Bend Community School Corporation. During that time, several principals and teachers for whom he had substituted submitted negative evaluations of Helland's performance and requested that he not return to their schools or classrooms. The evaluations indicated that Helland failed to follow lesson plans left for him by the teachers for whom he substituted and that he failed to maintain control of his classes. One teacher complained that Helland drank a nonalcoholic beer in class, and that the students believed it was alcoholic. Two teachers commented on Helland's lack of understanding of high school students, noting an incident where Helland gave his car keys to a student who had been suspended from school grounds. In addition, several teachers complained that Helland proselytized in his classes by reading the Bible aloud to middle and high school students, distributing Biblical pamphlets, and professing his belief in the Biblical version of creation in a fifth grade science class. After the latter incident, Helland agreed not to give the students an assignment if they agreed not to tell anyone about the discussion.

The School Corporation warned Helland numerous times that his poor performance as a substitute and his improper interjection of religion into the classroom were grounds for removing him from the substitute teacher list. Finally, in November 1993, it notified Helland that it no longer would hire him as a substitute teacher because he did "not follow[ ] lesson plans, [had] problems with classroom management and on some occasions . . . interjected . . . religious-oriented materials into portions of your classroom presentation."

Helland filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of his removal from the School Corporation's substitute teacher list. 42 U.S.C. § 2000e-5(e)(I). The EEOC declined to bring an action on Helland's behalf. Helland then commenced this lawsuit in federal court, alleging that the School Corporation discriminated against him because of his religion in violation of Title VII, § 1983, and RFRA.

I. *Title VII and § 1983 Claims*

The district court granted the School Corporation's motion for summary judgment on Helland's Title VII and § 1983 claims because it concluded that Helland had not responded to the motion with evidence sufficient to allow a factfinder to conclude that the School Corporation dismissed him because of his religion. Helland can prevail on his Title VII and § 1983 claims in one of two ways. He can offer direct proof of discriminatory intent, *Sample v. Aldi Inc.*, 61 F.3d 544, 547 (7th Cir. 1995), or he can rely on the indirect, burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Bruno v. City of Crown Point, Ind.*, 950 F.2d 355, 361 (7th Cir. 1991), *cert. denied*, 505 U.S. 1207 (1992), Under the *McDonnell Douglas* framework, the plaintiff first must establish by a preponderance of the evidence a prima facie case of discrimination, which creates a presumption that the employer unlawfully discriminated against the plaintiff. The burden then shifts to the employer to produce evidence which, if taken as true, would permit the conclusion that it had a legitimate nondiscriminatory reason for its challenged employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). If the employer meets this burden, the plaintiff then must prove bv a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Here, Helland had no direct evidence of intentional discrimination, and therefore opted for the second approach. Assuming, as did the district court, that Helland established a prima facie case of religious discrimination, the burden then shifted to the School Corporation to articulate a legitimate nondiscriminatory reason for removing Helland's name from the substitute teacher list. *Collier v. Budd Co.*, 66 F.3d 886, 889 (7th Cir. 1995). The School Corporation presented two such reasons to justify its actions. First, it stated that it removed Helland from the substitute teacher list because his job performance had not been satisfactory. In support of this contention, the School Corporation offered negative evaluations submitted by a number of teachers who criticized Helland's failure to follow the lesson plans the teachers left for him, and some of whom specifically requested that Helland not substitute for them again. Second, the School Corporation stated that it had discussed Helland because he defied repeated warnings against interjecting his religious beliefs into the classrooms. Both of these are legitimate non-discriminatory reasons for dismissing him. *See Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (public schools must make certain that "subsidized teachers do not inculcate religion"); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 69 (7th Cir. 1995) (poor job performance).

Once the School Corporation proffered these legitimate non-discriminatory reasons for its actions, HeHand had to present evidence that those reasons were a pretext for discrimination. Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate. "Pretext . . . means a lie, specifically a phony reason for some action." *Russell*, 51 F.3d at 68. "If the only reason an employer offers for [its challenged action] is a lie, the inference that the real reason was a forbidden one . . . may rationally be drawn ... and there must be a trial."

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994).

Here, Helland failed to produce evidence from which a rational factfinder could infer the School Corporation lied, and so the district court properly granted summary judgment for the School Corporation. *See Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). Helland points to evidence showing that some teachers were pleased with his performance as a substitute. He also alleges that some of the reports upon which the Corporation relied in deciding to remove him from the substitute list misinterpreted certain events. But that misses the point. What matters here is not whether there is evidence contrary to that relied on by the School Corporation in deciding to remove Helland from the substitute list, but whether the School Corporation believed the information was correct. *See Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991). We think that it did. The administrator who reviewed Helland's personnel file saw: numerous negative evaluations complaining about the quality of Helland's teaching, his inability to control his classes, and his failure to follow lesson plans; numerous requests that Helland not substitute for various teachers at several schools; and documentation of numerous admonitions to Helland that he stop interjecting religion into the classrooms. The reports provide sufficient nondiscriminatory reasons to conclude that Helland's work as a substitute teacher was subpar, and that the School Corporation did not unlawfully remove Helland from the substitute teacher list because of his religion itself. The district court properly granted the School Corporation's summary judgment motion as to Helland's Title VII and § 1983 claims.

II. *Religious Freedom Restoration Act*

Helland's amended complaint alleged that by "terminating [him] for refusing to cease from carrying his Bible to

work and to cease reading his Bible in privacy during job breaks, [the School Corporation] substantially burdened [his] free exercise of religion," and therefore violated RFRA. Under RFRA, the government may substantially burden a person's exercise of religion only if it demonstrates that its action furthers a compelling governmental interest and that its action is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-(l)(b). The district court granted summary judgment for the School Corporation on this claim because Helland had not responded to the motion with evidence sufficient to allow a factfinder to conclude that the School Corporation had substantially burdened his exercise of his religion without a compelling government interest.

Although we might not agree that the School Corporation's actions substantially burdened Helland's exercise of religion, *see Jones v. Mack*, 80 F.3d 1175, 1179 (7th Cir. 1996) (defining "substantial burden" under RFRA), the School Corporation concedes that issue, and we leave it at that. Helland appropriately "does not dispute that there is a compelling governmental interest against teaching religion in public schools." Indeed the Constitution requires governmental agencies to see that state-supported activity is not used for religious indoctrination. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 597 (1987); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Thus, the issue for us is whether removing Helland from the substitute teacher list was the least restrictive means of furthering the School Corporation's compelling governmental interest.

Helland contends that the School Corporation infringed on his right to carry his Bible to work and to read the Bible in privacy during job breaks, but he offers no evidence to show that it told him he could not do these things. In fact, in the narrative attached to his initial complaint, Helland stated that the School Corporation "never once told me that I could not carry my Bible with me to school for

personal use only." What the School Corporation frowned upon was not Helland's carrying the Bible to work and reading it in privacy, but his reading the Bible aloud to students and discussing religion during class, in contravention not only of the Constitution, but also of the lesson plans left for him.[1] A school can direct a teacher to "refrain from expressions of religious viewpoints in the classroom and like settings." *Bishop v. Aronov*, 926 F.2d 1066, 1077 (IIth Cir. 1991). And in fact the School Corporation has a constitutional duty to make "certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619.

Furthermore, the School Corporation gave Helland ample opportunity to practice his religion, so long as he did not use his classes for religious indoctrination. It tried to accommodate him by refraining from placing him at those schools and in those classes where teachers and students had complained about his interjection of religion in the classroom. And the School Corporation gave Helland ample warning that if he continued to do so, it would have no choice but to remove him from the substitute list. This is not only permissible, but as we already have noted, tolerating Helland's behavior would have opened up another constitutional can of worms.

Helland argues that the least restrictive means would have been to provide him with clear parameters for what the School Corporation deemed to be acceptable religious behavior. He contends that the substitute teacher handbook the Acting Superintendent gave him after the two met to discuss Helland's poor performance evaluations did not provide adequate guidance as to religious discussion in the

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[1] We note that in *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), the court upheld a school district's directive ordering a teacher to cease his silent Bible reading in the classroom during class time.

classroom, and that his actions merely reflected his confusion because of that lack of guidance.

But Helland's assertion is belied by his own actions showing that he knew he should follow lesson plans and not discuss religion in the classroom. In his affidavit submitted in opposition to the School Corporation's summary judgment motion, Helland stated that after he read the Bible to a sixth grade class, a school administrator told him "that I absolutely could not read the Bible. He further stated that he would have no choice but to fire me if I did it again. Now I knew what the School's policy was." And in a letter he wrote to the Superintendent after the School Corporation removed him from the substitute list, Helland admitted that after he discussed creationism in a fifth grade science class, he told the students that he could get into trouble for talking about Jesus and the Bible in school, and so he agreed not to assign homework if they would not tell anyone about the discussion.[2]

III. *Due Process*

Helland also contends that the district court should have addressed his due process claim, which the court found waived. Helland concedes that he "did not specifically raise the issue of a Due Process violation in the District Court." The only phrase in his original *pro se* complaint that

---

[2] Because we conclude that removing Helland from the substitute teacher list was the least restrictive means of furthering the compelling governmental interest in avoiding the unconstitutional interjection of religion into the South Bend public school classrooms, we do not reach the School Corporation's argument that RFRA represents an unconstitutional exercise of Congressional power. We note, however, that we recently deferred to the Fifth Circuit's analysis of why RFRA does not violate the separation of powers or the establishment clause of the First Amendement. *Sasnett v. Sullivan*, ___ F.3d ___ (7th Cir. Aug. 2, 1996), citing *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3017 (U.S. June 25, 1996) (No. 95-2074)

conceivably might raise the issue is a statement in his narrative that "I complain that in none of these schools was I given a chance to tell the truth as I saw it." But Helland did not follow up with any constitutional or statutory predicate for this statement, and made no attempt to invoke the due process clause or 42 U.S.C. § 1983. Furthermore, Helland's amended complaint, filed by counsel, deleted that statement and contained no allegation of a due process claim. Helland's failure to raise the claim below precludes him from doing so on appeal. *Citizens Ins. Co. of Amer. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994).

Helland contends, however, that because he is a *pro se* plaintiff, we should allow him to press his claim. However, we have not routinely excused *pro se* plaintiffs from the same waiver rules attorneys face. Dixon v. Chrans, 986 F.2d 2017 203 (7th Cir. 1993). Furthermore, although Helland filed his original complaint *pro se*, he was represented by counsel when he filed his amended complaint. We see no reason to depart from the general rule of waiver in this case.

CONCLUSION

For the foregoing reasons, we affirm the district court's order granting summary judgment for the School Corporation.

AFFIRMED.

B. CONSTITUTIONAL PROVISIONS & STATUTES

U.S. CONSTITUTION AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION AMENDMENT 14 §1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000bb-1. FREE EXERCISE OF RELIGION PROTECTED

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -

(1) is in furtherance of a compelling governmental interest;

and

(2) is in the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000e-2. UNLAWFUL EMPLOYMENT PRACTICES

(a) Employer practices. It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

C. TERMINATION LETTERS

SOUTH BEND COMMUNITY SCHOOL CORPORATION
635 SOUTH WAIN STREET SOUTH BEND, INDIANA
46601

November 10, 1993

Mr. Peter Helland
P.O. Box 382
Notre Dame, IN 46556

Dear Mr. Helland:

Please be informed that effective immediately you will no longer be hired as a substitute teacher for the South Bend Community School Corporation. This decision was made after our office was notified by the Principal of Tarkington Elementary School of your substitute teaching experience at Tarkington Elementary School on Friday, October 29, 1993. It was reported to us that students in the fifth grade were upset because of your discussion of religion and evolutionary theories. Also, a teacher at Tarkington reported to the principal that you had brought a bible into the classroom. The principal reported that she informed you that religion is not taught in our schools and requested that you not be assigned again as a substitute teacher at Tarkington Elementary School.

As you are aware, on December 3, 1992 I informed you that we were concerned about other incidents in our schools that were reported to us by teachers and building principals concerning your involvement in religious discussions, reading the bible in the classroom, etc. I explained to you at

that time that you would not be assigned to Riley High School, Washington High School, LaSalle High School, Adams High School, Clay Middle School, Marshall Elementary School, and Nuner Elementary School due to not following lesson plans, problems with classroom management and on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation and that this type of performance would not be acceptable. I also informed you at that time, that you should consider it as your last warning and if you continued to interject religion into your classroom presentation we would no longer use you as a substitute teacher.

Also, you have been into our office during the 92-93 school year to meet with Mr. William Roberts, Director of Human Resource & Services and myself to discuss these concerns and on May 20, 1993 Mr. Ralph Komasinski, Acting Superintendent of Schools mailed you a letter which addressed these concerns.

I am sorry that you allowed this to happen again. I have no alternative but to inform you that we will no longer use you as a substitute teacher in our schools.

Sincerely,

/s/
John Hemphill
Assistant Director
Human Resource & Services

jh

cc: Dr. Virginia B. Calvin, Superintendent
Ralph Komasinski, Deputy Superintendent
Mai Pittman, Human Resource & Services

To Human Resources:

Re: Substitute Teacher

Attention - W. Roberts

On Friday, October 29, 1993, Mr. Peter Helland substituted in a fifth grade classroom at Tarkington school. Quite a stir was caused due to fact that Mr. Helland allow himself to get into a discussion of religion and evolutionary theories. Some students were upset by this discussion and came to me with the issue. After school I spoke with Mr. Helland about what had been reported to me. He explained that the discussion had occured during science class, and he was attempting to explain the evolving of man in relation to the dinosaur era. A teacher reported that Mr. Helland had brought a bible into the classroom. When asked about it he stated that "he was a Gideon, and therefore must have his Bible with him at all times. I explained to him that religion is not taught in our schools.
Due to concern and discussion among student, staff and one parent, I feel it would be a good idea for Mr. Helland not to return to Tarkington as a substitute teacher.

Respectfully Yours

Obera McDonald, Principal

Supreme Court, U.S.
FILED
NOV 13 1996
CLERK

No. 96-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PETER HELLAND,
Plaintiff-Petitioner

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DISTRICT COURT OPINION

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15 pp

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

PETER HELLAND,)
)
Plaintiff)
)
vs.)
No. 3:94-CV-852RM)
)
SOUTH BEND COMMUNITY SCHOOL)
CORPORATION,)
)
Defendant)

MEMORANDUM AND ORDER

When Peter Helland was dismissed from his position as a substitute teacher for the South Bend Community School Corporation, the School Corporation stated it was due to his failures to follow lesson plans, his conduct demonstrating poor judgment, and his injection of religion into classrooms. Believing that his religious beliefs were the true reason for his dismissal, Mr. Helland brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, 42

U.S.C. § 1983, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Because Mr. Helland has not responded to the School Corporation's summary judgment motion with evidence sufficient to allow a fact finder to conclude that he was dismissed due to his religion or that the School Corporation substantially burdened Mr. Helland's exercise of his religion without a compelling government interest the court grants the School Corporation's summary judgment motion.

> A party seeking summary judgment must demonstrate that no genuine Issue of fact exists for trial and that the movement is entitled to judgment as a matter of law. If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent.
>
> The parties cannot rest on mere allegations in the pleadings, or upon conclusory allegations in affidavits. The court must construe the facts as favorably to the non-moving party as the record will permit, and draw any permissible inferences from the

> materials before it in favor of the non-moving party, as long as the inferences are reasonable. The non-moving party must show that the disputed fact is material, or outcome-determinative, under applicable law.

Conery v. Bath Associates, 803 F. Supp. 1388, 1392-1393 (N.D. Ind. 1992) (citations omitted).

The parties do not dispute that Mr. Helland is a Christian with deeply held religious beliefs. The School Corporation does not appear to dispute Mr. Helland's assertion that carrying a copy of the Bible whenever possible is part of his belief. The parties dispute the role Mr. Helland's beliefs played in his discharge.

Two months after Mr. Helland filed this action in his own behalf, counsel appeared for him. His attorneys filed the amended complaint presently before the court. Accordingly, the court does not employ the standards of Haines v. Kerner, 404 U.S. 519 (1972), in determining the issues before the court. The complaint specifies the claims brought on Mr. Helland's behalf; neither in Mr. Helland's complaint nor in

his summary judgment memoranda does Mr. Helland raise a claim that the School Corporation violated his rights under the Fourteenth Amendment's Due Process Clause. Accordingly, although much of Mr. Helland's argument is addressed to the absence of an opportunity for him to refute allegations made against him, the court addresses the case as one alleging religious discrimination and burdening the exercise of religion, and not one alleging a violation of the right to notice and an opportunity to be heard before being dismissed.

Although Mr. Helland was represented by counsel at the time his amended complaint was filed, counsel had withdrawn by the time he responded to the summary judgment motion. After the school corporation had filed its reply brief, Mr. Helland asked for an opportunity to respond to what he perceived as a new issue raised in that brief. Although the issue might not have been truly new to the case, the court allowed Mr. Helland that opportunity because he

may not have recognized the issue when he filed his initial response. In the order granting the request, the court limited its permission to the filing of matters directed to the new issue. The School Corporation believes Mr. Helland exceeded the scope of that permission, and moves to strike it. The court agrees that much of Mr. Helland's sur-reply exceeded the scope of the "new" issue, but because the School Corporation does not appear to have been prejudiced by the untimeliness of Mr. Helland's submission, the court declines to strike it.

Mr. Helland presents no direct evidence that his religion--as distinct from his religious conduct--was a reason for his dismissal, and so must rely on the indirect method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs vs. Burdine*, 450 U.S. 248 (1981). The School Corporation does not challenge Mr. Helland's ability to establish a *prima facie* case under that analysis; instead, it

argues that Mr. Helland has insufficient evidence to establish that its stated legitimate nondiscriminatory reason is pretextual. The School Corporation points to its information that Mr. Helland distributed religious sexually oriented material to a middle school class (in 1979), that he was arrested outside a high school for passing out religious materials to students (1983), that several teachers (Edison Middle, 1985; Adams High, 1989 and 1992; Nuner Elementary, 1992; Tarkington Elementary, 1992) and principals (Clay Middle, 1987; Adams High, 1987 and twice in 1992; Tarkington Elementary, 1992) had asked that Mr. Helland not substitute again in their class or school, that Mr. Helland read the Bible to students during class (Washington High, 1986; Clay Middle, 1987; Adams High, 1992), that Mr. Helland had mismanaged students or failed to follow lesson plans while substituting (Washington High, 1986; Adams High, 1987, twice in 1989, and twice in 1992; Nuner Elementary, 1992), and that Mr. Helland drank a non-

alcoholic beer in front of elementary students (Nuner Elementary, 1992). The School Corporation points to a 1993 letter warning Mr. Helland of his poor performance; its records indicate that after that warning letter, Mr. Helland passed out religious newspapers at Adams High School in 1993 and ignored a lesson plan, discussed creationism and read from the Bible during a Tarkington Elementary School class In 1993. The School Corporation removed Mr. Helland's name from the substitute teacher list on November 10, 1993.

Mr. Helland submitted scores of documents, as well as his own affidavits, in an effort to establish that some of the reports on which the School Corporation claims to have relied are procedurally defective, that others are simply wrong or are misinterpretations of events (alleging conduct at one school on a day on which he worked at another school; reporting that he distributed newspapers, when it was a friend who distributed the newspapers, though the papers contained

an article Mr. Helland had written), and that he was a good teacher who discussed religious matters only infrequently and then at the behest of students. He also argues that given the number of classes he taught over the years as a substitute, the number of complaints against him is far smaller than it could have been. None of Mr. Helland's materials, however, support an inference that the School Corporation did not believe the reports it had received.

Although, at the summary judgment stage, an employment discrimination plaintiff need only produce enough evidence to allow a reasonable fact finder to infer that the employer's proffered reasons were pretextual, *Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir. 1995), simply disputing the extent or significance of the conduct upon which an employment decision was based does not satisfy that burden. *Sample v. Aldi Inc.*, 61 F.3d 544, 548-551 (7th Cir. 1995). Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on the

honesty, not the accuracy, of the employer's reason. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68-69 (7th Cir. 1995). A pretext is a lie--a phony reason for an action. *Perdomo v. Browner*, 67 F.3d 140, 144-145 (7th Cir, 1995). Accordingly, while a plaintiff may satisfy his pretext burden by showing, that the proffered reasons had no basis in fact, *Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995), the burden is not met simply by offering alternative explanations for the proffered reasons' factual bases. Such evidence merely invites second-guessing.

Although Mr. Helland disputes the accuracy of the reports on which the School Corporation acted, the reports provide ample reason, without regard to Mr. Helland's religion, to conclude that Mr. Helland was not performing as a substitute public school teacher should. His religious activities in the schools and discussions with students may well have played a role in the decision to dismiss him, but nothing in the record indicates that Mr. Helland's religion

requires him to discuss his religious beliefs with students (his brief indicates a secular belief that such discussions are necessary to perform the role of an Indiana schoolteacher). Mr. Helland has not offered evidence from which a reasonable fact finder could conclude that the School Corporation's proffered reasons for dismissing him were lies. Therefore, the School Corporation is entitled to judgment as a matter of law on Mr. Helland's claims under Title VII and § 1983.

The School Corporation argues that the Religious Freedom Restoration Act is unconstitutional because it represents a legislative effort to undo the Supreme Court's interpretation of the First Amendment in *Employment Division v. Smith*, 494 U.S. 872 (1990). The court need not decide the Act's constitutionality because Mr. Helland has not offered sufficient evidence from which a reasonable trier of fact could find that the School Corporation substantially burdened Mr. Helland's exercise of his religion without a

compelling interest. As noted in the preceding paragraph, the School Corporation did not dismiss Mr. Helland because of his beliefs as distinct from his conduct as a teacher, and Mr. Helland does not contend that his religious beliefs require him to discuss his religion with the students he is hired to teach. The record's only reference to the requirements of his belief is found in his affidavit, where he states he must carry a copy of the Bible whenever possible. Mr. Helland does not aver that this qualified obligation requires him to carry the Bible to classrooms where his employer is forbidden to endorse religion.

The Religious Freedom Restoration Act provides that a government may substantially burden a person's exercise of religion if doing so is the restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb(3)(b). If the School Corporation is assumed to have burdened Mr. Helland's religious exercise substantially, it had a compelling reason for doing so: as mentioned in the preceding paragraph,

a public school system cannot endorse Christianity or any other religion, whether directly or through its agents. *See generally Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510 (1995); Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995); *Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994); *Lamb's Chapel v. Center Moriches Union Free School Dist*, 113 S. Ct. 2141 (1993). Accordingly, a public school system has a compelling interest in assuring that its teachers do not use publicly-funded classrooms and school property during school hours to espouse a religion. The School Corporation also has a compelling interest in assuring that substitute teachers follow established lesson plans and curricula. Mr. Helland's history of using, classrooms and school property to discuss his religious beliefs, and varying from lesson plans in doing so, intermittently since 1979, provides ample evidence that Mr.

Helland's dismissal was the least restrictive means of furthering that compelling interest.

The School Corporation is entitled to summary judgment on Mr. Helland's claim under the Religious Freedom Restoration Act.

Perhaps Mr. Helland is correct that the teachings of religions (or at least the moral lessons taught by religions) should have a place in South Bend's schools, or perhaps not. Further comment on those arguments is inappropriate because it is not this court's role to decide such matters in light of the current state of the law, and such matters need not be decided to resolve the claims Mr. Helland has presented to the court. The evidence in the record would not allow a reasonable trier of fact to conclude that Mr. Helland's religion was a motivating factor in his dismissal, or that the School Corporation substantially burdened his exercise of his religion without using the least restrictive means to further a compelling government interest.

Accordingly, the defendant's motion for summary judgment (filed May 26, 1995 (#20)) must be, and hereby is, GRANTED. The defendant's motion (filed October 13, 1995 (#52)) to strike certain of the plaintiff's summary judgment submissions is DENIED. The clerk is directed to enter judgment in favor of the defendant and against the plaintiff.

SO ORDERED.

ENTERED: December 7, 1995

/s/

Robert L. Miller, Jr.,
Judge

United States District Court

Supreme Court, U.S.
F I L E D
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CLERK

NO. 96-773

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PETER HELLAND
Petitioner,
v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION
Respondent.

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit, in a mixed-motive employment case, properly determined that Mr. Helland's poor job performance alone would have justified his removal from the substitute teacher's list?

2. Whether a public school corporation has a compelling interest under the Establishment Clause in restricting a teacher's in-class religious speech and activities in primary and secondary schools that outweighs the teacher's First Amendment right to free speech, academic freedom, or free exercise?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Peter Helland, and the Respondent, the South Bend Community School Corporation.

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INTRODUCTION

The Respondent, the South Bend Community School Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari (hereinafter "Petition") to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. Although some of the questions presented by the Petitioner may be issues of great weight needing resolution by this Court, because of facts unique to this case, it is not the best vehicle to address these issues.

OPINIONS BELOW

The opinion of the court of appeals is reported at 93 F.3d 327 and is attached to the Petition, p. A-1 through A-9. In a supplemental filing, the Petitioner has provided a copy of the unreported district court opinion in the Supplemental Appendix, p. A-17 though A- 30.

JURISDICTION

The Petitioner has adequately stated the jurisdiction of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner has adequately cited the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The statement of the case prepared by the Petitioner is less than completely factually accurate. In accordance with Rule 15.2, the following detailed factual narrative is provided to cure that defect.

I. COURSE OF PROCEEDINGS

On October 28, 1994, the Petitioner, Peter Helland, filed a **pro se** complaint in the United States District Court for the Northern District of Indiana naming as the Defendant, the South Bend Community School Corporation (hereinafter "School"). In the Complaint Mr. Helland asserted that the School's actions in removing him from the School's substitute teacher's list violated his rights under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e). Specifically he alleged that he was "terminated for constitutionally proted religious activities and practices [sic] . . .," that he was not "given a chance to tell the truth as [he] saw it," and that his "constitutionally protected Christian style of teaching was perhaps irritating to some people." On January 26, 1995, with the aid of legal counsel, Mr. Helland filed an amended complaint, which in addition to the Title VII claims, also contained allegations that the School's actions violated his First Amendment rights as enforced under 42 U.S.C. § 1983, as well as the Religious Freedom Restoration Act ("RFRA")(42 U.S.C. §2000bb).

On December 7 1995, the District Court entered summary judgment in favor of the School finding that Mr. Helland presented no evidence that his religious beliefs, rather than his religious conduct, were the reason for his removal from the substitute teacher list. It also found that the School Corporation articulated "ample reason, without regard to Mr. Helland's religion," to dismiss him. With respect to the

RFRA claim the District Court held that given his past conduct, Mr. Helland's removal from the substitute teacher's list was the least restrictive means of furthering the School's compelling interest in avoiding an Establishment Clause violation and in having substitute teachers follow lesson plans and curriculum established by the regular classroom teacher and the School. The constitutionality of RFRA was raised but not addressed by the Court because it found that Mr. Helland had failed to offer "sufficient evidence from which a reasonable trier of fact could find that the School Corporation substantially burdened Mr. Helland's exercise of his religion without a compelling interest."

On August 15, 1996, the Seventh Circuit affirmed summary judgment in the School's favor finding that Mr. Helland was properly removed from the substitute teacher list "because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms."[1] Helland, 93 F.3d at 331.

II. STATEMENT OF THE FACTS

Mr. Helland was first employed by the School on May 1, 1979, as a substitute teacher. (D. # 22, Resp. to Req. for Adm., No. 1, Application for Substitute Teaching, Exh. "A") He substitute taught for the School during the 1979-1980 school year and then left the School seeking employment at the St. Joseph County Welfare Department between June, 1980 and June, 1985 as a food stamp caseworker. (Id., Resp. to 2nd Int., No. 2(b)) Mr. Helland was rehired as a substitute

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[1] The Petitioner's introduction misstates the holdings of lower courts. Neither Court held that the School could properly prohibit "teachers from carrying their Bibles to School" as stated by Petitioner. (Petition, p. 1) What the School sought to curtail was Mr. Helland's practice of placing his Bible on his desk in the classroom and reading the Bible in the classroom during class time. The Seventh Circuit specifically found that the School never restricted Mr. Helland's right to carry his Bible and to read it during non-class time. "In fact, in the narrative attached to his initial complaint, Helland stated that the School corporation 'never once told me I could not carry my Bible with me to school for personal use.'" Helland, 93 F.3d at 331.

teacher by the School in August of 1985 and remained on the substitute teacher list until November 10, 1993, when he was removed from the list for unsatisfactory performance. (Petition, p. A-14)

Mr. Helland is a deeply religious individual whose "Christian and Gideon beliefs require that he carry a Bible whenever physically possible and he holds a bona fide and sincerely held religious belief and conviction that he must comply with these beliefs." (Petitioner's Seventh Circuit Brief, p. 4) Mr. Helland professes a "Constitutionally protected Christian style of teaching" and posits that "some teachers and administrators did not want me in their public schools because my Christian witness was a bother to them." (D. # 1, Complaint, p. 4) As part of his Christian style of teaching and his Christian witness Mr. Helland has been involved in numerous evangelistic programs both on and off school grounds.[2] (Id.)

When an applicant is approved as a substitute for the School his or her name is added to a substitute teachers list. (D. # 22, Resp. to Req, for Adm., No. 29, Substitute Teachers' Handbook, Exh. "DD") When a teacher requests a substitute an applicant from this list will be called. Pursuant to the School's policy, "if the substitute's work is deemed unsatisfactory by one or more teachers in a particular school, the

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[2] "I have frequently passed out new testaments with my fellow Gideons on the public school sidewalks throughout the eight years I substitute taught." (D. # 1, Complaint p. 4) In connection with these activities Mr. Helland was arrested in October of 1983 (when he was not employed by the School) for trespass when he was involved in proselyting and passing out religious tracts on and around the grounds of South Bend Riley High School (D. # 36, 10/9/93 South Bend Tribune Article) Mr. Helland was an active participant in Young Life "ministering to Adams and Clay high school students," (D. 35, Helland Aff'd., p. 1, para. 3) and was also active as a lay minister at the St. Joseph County Jail as well as the Parkview and South Bend Juvenile facilities. (D. # 1, Complaint p. 4, Narrative; Appellant's Brief, p. 4) The School does not dispute the strength, depth or wisdom of Mr. Helland's religious convictions, it only questions the appropriateness of the times and places he has chosen to exercise them, and in particular whether it was appropriate for him to do so in the School's classrooms during class time.

principal may recommend to the Personnel Department that the substitute teacher not be sent to that school in the future." (Id., p. 7) A form for evaluating the substitute teacher's performance is attached to the Handbook and provided to teachers. (Id., App. B) Because there is no requirement that evaluations of substitutes be done, these forms are used almost exclusively to report extremely positive or e..tremely negative behavior by substitutes as well as to make the request, mentioned above, that the substitute not return to a particular school or class.[3] When a substitute teacher is found unsatisfactory in many buildings, that teacher may be removed from the substitute list entirely. (Id.)

During the period of time Mr. Helland substitute taught, several teachers and principals sent negative evaluations to the School's Human Resources Department regarding Mr. Helland's performance, and asked that he not be permitted to substitute teach for their classes and/or in their buildings. Mr. Helland concedes that many such complaints were in his personnel file, but contests the truth of the complaints or the motivations of the people making the complaints. These performance based complaints, as well as Mr. Helland's refusal to stop interjecting religion into the classroom despite repeated warnings, culminated in the School's decision to remove Mr. Helland from the substitute teacher's

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[3] Mr. Helland argues that because he had 720 teaching experiences and only received several highly negative evaluations, the remainder must have been positive. This is not true. The written negative evaluations represented those teachers and principals who were so dissatisfied with Mr. Helland that they were willing, in writing, to demand that he never return to their class or school. On the other occasions the teachers simply chose not to fill out any evaluations, which was their option. (Plaintiff's Affidavit List , Barr Aff'd., p. 2, para. 4) Mr. Helland made no proffer of evidence to indicate that any other evaluations even existed, much less were available for review. The statement in the Petition that "[t]he Corporation refused to produce the 713 positive evaluations" (Petition, p. 4) is untrue and designed to mislead the Court. Mr. Helland never even requested such documents from the School during discovery, much less produced them to the district court in opposition to the School's summary judgment motion as he was obligated to do. Celotex Corp. v. Catrett, 477 U.S. 317, 322-325 (1986)

list entirely on November 10, 1993. The individual who made the decision to remove Mr. Helland from the substitute teacher's list was John Hemphill, Assistant Director of Human Resource and Services. Mr. Hemphill made his decision based on the following incidents and complaints documented in Mr. Helland's personnel file:

1. On May 10 and 11, 1979, Mr. Helland substituted at Clay Middle School. He received a negative evaluation for his performance during this assignment for the quality of instruction, discipline, and adaptability. The school principal, Ralph Komasinski, also commented that during class Mr. Helland read the Bible to students and distributed "religious and sexually oriented material" to the class. (D. # 22, Resp. to Req. for Adm., No. 2, 5/11/79 Substitute Teacher Evaluation, Exh. "B"; Resp. to 1st Int., No. 1(a)) This material included a document titled the "Gay Blade" which was a multi-page tract preaching about the sin of homosexuality, containing a short version of the biblical story of Lot, and containing explicit descriptions of homosexual acts. (Id.) Mr. Helland acknowledged having this religious material on his desk accessible to students and that students read it: "[O]ne student in my class was given a chance to read a piece of my literature. I let him read it for only five minutes before I then took it back." (D. # 35, Helland Aff'd., p. 3, para. 1)
2. On September 16 and again on October 11, 1985, Mr. Helland substituted at Edison Middle School and received an unsatisfactory mark in the discipline category. The teacher and principal requested that Mr. Helland not be permitted to substitute again. (D. # 22, Resp. to Req. for Adm., No. 4, Substitute Teacher

Evaluation, Exh. "D") Mr. Helland admits this. (D. # 35, Helland Aff'd., p. 3, para. 3)[4]

3. In his own affidavit in opposition to summary judgement Mr. Helland stated that "in September of 1986, the principal at Darden reported to the downtown office that I had read the Bible to a sixth grade class." In connection with this complaint, Mr. Helland stated that: "I admitted to Mr. William Roberts [the School's personnel director] that I read about three verses of Scripture because the children had been begging me all day to read something from my Bible. . . . He said that I absolutely could not read the Bible. **He further stated that he would have no choice but to fire me if I did it again. Now I knew what the School's policy was.**" (Id., p. 3, para. 4)(emphasis and parenthetical supplied).[5]

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[4] Throughout his Petition Mr. Helland complains that the School failed to follow a School policy in that it never reviewed the negative evaluations with him or gave him an opportunity to respond to them. However, Mr. Helland was a substitute teacher, and the School policy to which he refers requiring such a review with the teacher only applies to the annual evaluations of regular tenured teachers, not the occasional evaluations of substitute teachers. (See Barr Aff'd., p. 2) The evaluations were placed in Mr. Helland's personnel file which was available for his review at any time as noted in his own materials. (Petition, p. 8, n. 4 "Mr. Helland did not learn it existed until he initiated a review of his file."). Furthermore, he was also notified when he was barred from a particular school. Once he had that notification, he could simply ask to see his personnel file to determine the reason why he was banned, as he did when he was banned from Adams High School in 1992. (D. # 22, Resp. to Req. for Adm., No. 22, Helland's Letter to Dr. Calvin, p. 1, Exh. "W")

[5] This incident highlights the fact that Mr. Helland through his activities had, as early as 1986, become so identified with Christian religious beliefs that students were, to use his own language, "begging [him] all day to read from his Bible" in class. The fact that the students understood Mr. Helland's Christian religious beliefs and knew he would express them in the classroom is evident from the affidavits of the students tendered by Mr. Helland. See Plaintiff's Affidavit List, Response to Question No. 10, Exhibits No. 14 (Beavo Aff'd.); No. 15 (Payne Aff'd.); No. 19 (Perry Aff'd.); No. 20 (Johnson Aff'd.); No. 21 (Bond Aff'd.); No. 22 (Ingram Aff'd.); No. 23 (Adams Aff'd.); No. 24 (Georgette Adams Aff'd.); No. 25 (Pearson Aff'd.); No. 26 (Dempsey Aff'd.); and No. 27 (Pierson Aff'd.). In

4. On October 16, 1986, Mr. Helland was assigned to substitute at Washington High School. His performance for this assignment was evaluated as unsatisfactory in three out of four categories. Additionally, the principal commented that Mr. Helland read the Bible during class to students[6], allowed students to leave the room without a pass, and lost the answer book for the student workbook. (Id., No. 5, Substitute Teacher Evaluation, Exh. "E"; D. # 22) Mr. Helland admits that: "I had been reading my Bible silently during my breaks." (D. # 22, Resp. to 1st Int., No. 1).

5. On April 20, 1987, Mr. Helland was given an unsatisfactory evaluation for the quality of his performance as a substitute at Clay Middle School on April 9 and 10, 1987. The school principal complained that Mr. Helland read the Bible[7] to the students during class and requested he not be sent back to Clay Middle School. (D. # 22, Resp. to Req. for Adm., No. 6, Substitute Teacher Evaluation, Exh. "F") Mr. Helland admits that: "I had silently read my Bible at my desk while the class finished a written assignment." (D. # 22, Resp. to 1st Int., No. 1).

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fact, every student-affidavit introduced by the Petitioner, except for No. 16 (Johnson Aff'd.) indicates that the students knew of Mr. Helland's evangelical Christian beliefs and his desire to propagate these beliefs and as a consequence sought him out for religious guidance. This particular incident also illustrated the reason the School was concerned over Mr. Helland bringing his Bible into the class and reading it during class time.

[6] Please note that his reading the Bible in class occurred **after** Mr. Helland admitted that he had been warned and after he said "[n]ow I knew what the School's policy was." This directly contradicts note 3 of the Petition where it is asserted that "Mr. Helland has always sought to fully comply with the directives of the Corporation." (Petition, p. 7 n. 3)

[7] See note 6.

6. On November 18, 1987, Mr. Helland was placed as a substitute teacher in a special education class at Adams High School. During that assignment he gave his car keys to a student who had been suspended from school grounds. Mr. Helland allowed the student to remain in his car so that he could drive the student home after school. A security guard found that student and several others sitting in Mr. Helland's car. Mr. Helland stated he did not realize that giving his car keys to the suspended student would create a problem. The teacher who submitted the evaluation of Mr. Helland requested that Mr. Helland not be assigned to Adams High School in the future due to his lack of understanding of high school students. As a result, on December 1, 1987, Mr. Przybysz, principal of Adams High School, requested that Mr. Helland not be assigned to Adams High School special education classes. (D. # 22, Resp. to Req. for Adm., No. 7, Inter-Office Memorandum, Exh. "G")

7. According to his own sworn testimony, on February 2, 1988, Mr. Helland discussed the Bible with a number of male students during class: "[I] had a detailed conversation with (6) six males, in class regarding Jesus. The males approached me that day and questioned my beliefs, and I told them." (Id., No. 24, EEOC Affidavit by Mr. Helland, Exh. "Y", p. 1; D. # 35, Helland Aff'd., p. 5-6)

8. On October 9, 1989, Mr. Helland substituted at Adams High School. His performance was poor in three categories: teacher performance, behavior and record keeping. The teacher noted that Mr. Helland did not follow the lesson plans she left and he discussed religion with the class instead of letting them study.

She requested he not be assigned to her classroom again. (D. # 22, Resp. to Req. for Adm., No. 8, Teacher Evaluation of Substitute Performance, Exh. "H")

9. On November 13, 1989, Mr. Helland was assigned to substitute at Adams High School. He received a poor teacher performance evaluation because he did not follow the lesson plans and he did not explain any of the lesson plan to the students. (D. # 22, Resp. to Req. for Adm., No. 9, Teacher Evaluation of Substitute Performance, Exh. "I") Mr. Helland admits this. (D. # 35, Helland Aff'd., p. 4, para 4)

10. On January 24, 1992, Mr. Helland substituted at Nuner Elementary School. He received a poor evaluation for management of classroom behavior. Mr. Helland drank a Millers' Sharp Beer during class and left the bottle on his desk throughout the day. Although the bottle contained a non-alcoholic beverage, the bottle said "Millers" and the students believed it contained beer. The teacher requested he not be returned to her classroom. (D. # 22, Resp. to Req. for Adm., No. 10, Teacher Evaluation of Substitute Performance, Exh. "J") "Plaintiff admits that he drank a Millers' Sharp Beer in the presence of the students . . . ." (D. # 35, Helland Aff'd., p. 4, para. 4).

11. On March 30, 1992, Mr. Helland substituted at Adams High School. He received a poor evaluation for this assignment because he did not follow the lesson plan left for him and the students complained about his behavior. (D. # 22, Resp. to Req. for Adm., No. 11, Teacher Evaluation of Substitute Performance, Exh. "K")

12. On April 27, 1992 through April 29, 1992, Mr. Helland substituted at Adams High School. The building principal requested that he not be reassigned to his building as a substitute. (Id., No. 12, Teacher Evaluation of Substitute Performance, Exh. "L") Despite this request, on September 4, 1992, Mr. Helland again substituted at Adams High School. He received a poor evaluation for teacher performance, behavior, and record keeping. The evaluation form states he did not follow the instructions written for the substitute. The teacher requested he not be returned to her class as a substitute. (Id., No. 13, Teacher Evaluation of Substitute Performance, Exh. "M")

13. On October 6, 1992, Mr. Helland was assigned to Tarkington Elementary School. He received a poor evaluation for teacher performance and behavior management. The evaluation explained Mr. Helland did not follow the lesson plans and that the class was so "loud and out of control" that adjoining classes were disturbed. It was requested that he not be reassigned to that building. (Id., No. 13(duplicate), Teacher Evaluation of Substitute Performance, Exh. "N")

14. In addition to these specific evaluation forms, Mr. Phebus, principal of John Adams High School wrote a letter to the School Human Resources Department on November 16, 1992, requesting that because of his problems Mr. Helland no longer be assigned to Adams High School as a substitute teacher. (Id., No. 14, 11/16/92 Inter-Office Memorandum, Exh. "O"; Resp. to 1st Int., No. 1(a)) According to Mr. Helland, Mr. Phebus was concerned about Mr. Helland's involvement in "passing out the religious brochures that were left

scattered in the halls." Mr. Helland had authored an article in the brochures. (D. # 35, Helland Aff'd., p. 7, para. 1-2)

15. As a consequence of this situation, on December 3, 1992, Mr. Helland met with Mr. Hemphill and was warned of "our concern about [him] passing out religious material, reading the Bible in the classroom etc. I informed him that if it continued we would no longer use him as a Substitute Teacher." Mr. Helland was also told that: "This should be considered as his last warning ... ." (D. # 22, Resp. to Req. for Adm., No. 15, 12/3/92 Inter-Office Memorandum, Exh. "P") Mr. Helland acknowledges this conversation. (D. # 35, Helland Aff'd., p. 8, para. 1)

16. In April of 1993, while substituting at Adams High School, Mr. Helland again interjected religious materials into the classroom. The students complained that: "He handed out pamphlets on the Bible and preached on various Bible passages while in the class[8]. ... read his Bible to himself at the teachers desk ... [K]ept pretty much to himself unless asked a question, and in that case he would talk about religion . . . The school is a place for education not worship." (D. # 22, Resp. to Req. for Adm., No. 18, 4/26/93 Inter-Office Memorandum, Exh. "S")

17. Due to his continuing problems, and after having been warned several times not to interject his religious beliefs into the classroom, on April 14, 1993, Mr, Helland met with the acting Superintendent, Ralph Komasinski, to discuss his religious activities and other classroom

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[8] See note 6.

problems. On May 20, 1993, Superintendent Komasinski, wrote Mr. Helland notifying him of his teaching deficiencies and expressing concern over Mr. Helland's defiant refusal to follow directives not to depart from the lesson plan left for him and interject religious materials into the class. Mr. Helland was warned that termination was imminent, should he fail to heed the directives. (Respondent's Appendix, p. A-1 through A-2) Mr. Helland acknowledges this meeting and receiving this letter. (D. # 35, Helland Aff'd., p. 7, para. 3-4)

18. Following this warning, sometime in late May or early June, 1993, Mr. Helland was involved in passing out religious newspapers in school which stated, in part, "Commander-in-Chief of the Universe Jesus Is He in charge of YOUR life?" These materials were given to students during classes and both parents and students complained about the distribution of these materials at school. (D. # 22, Resp. to Req. for Adm., No. 19, Inter-Office Memorandum, Exh. "T")

19. On October 28, 1993, while substitute teaching at Tarkington Elementary School, Mr. Helland, ignoring the prepared lesson plan, conducted a discussion of his religious beliefs and creationism with a fifth grade science class. He also apparently brought a Bible to class and read from the Bible. (Id., No. 20, 11/8/93 Inter-Office Memorandum, Exh. "U"; D. # 22, Resp. to 1st Int., No. 1). He specifically admitted this incident in his affidavit (D. # 35, Helland Aff'd., p. 9-10) as well as his Complaint. In his letter to the Superintendent following his removal from the substitute teaching list Mr. Helland stated: "She [the Principal at Tarkington

> Elementary] called me into her office and I told her something about the boy who had become upset as I was teaching the idea of evolution. I assured him that it was only a theory that we evolved from monkeys. That thought still did not comfort him because just the idea that we evolved from monkeys seemed to greatly disturb him. I then proceeded to assure him that I too believed in the Bible and in Jesus and that God created us in His image like the Bible teaches. When I gave him this assurance I added that I could get in trouble talking about Jesus and the Bible in school. So I told them not to go around saying I was teaching the Bible because that is not what I was doing. They said they would not tell if I did not give them an assignment. Since it was Friday and no assignment was issued, I said ok." (D. # 22, Resp. to Req. for Adm., No. 22, 12/22/93 Letter to Supt. Calvin, Exh. "W")[9]

Mr. Helland had thus been warned as early as September of 1986 by the School's personnel director to stop interjecting religion into the classroom and to stop reading his Bible in class or "he would have no choice but to fire me if I did it again,"[10] yet he continued to do it.

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[9] In his pro se brief in opposition to the School's motion for summary judgment Mr. Helland admitted that he interjected creationism into this class but argues that it was his duty to interject his Christian perspective: "I was teaching Mr. Seng's class about evolution just before I was fired. However, when children ask or when it is appropriate I feel it is part of my duty as a teacher to inform them in an objective manner about what scientist say about creationism. I believe that children deserve a well-rounded education . . . ." (D. # 34, Plaintiff's Brief, p. 8)

[10] In his Petition Mr. Helland takes the Seventh Circuit to task for finding "numerous warnings that did not exist." (Petition, p. 9) Mr. Helland erroneously states to this Court that "[o]nly once, in a discussion recorded in the December memo, did the school make anything like a 'warning' to Mr. Helland before he filed his EEOC Complaint." (Id.) It is hard to imagine a more explicit warning than that delivered by Mr. Roberts in 1986, yet even though Mr. Helland admits receiving this warning in all of the other pleadings filed in

Mr. Helland was again specifically warned in December of 1992 by Mr. Hemphill to stop interjecting religion into the classroom as well as being notified of his classroom deficiencies, yet again he failed to heed this warning despite the fact that "[t]his should be considered as his last warning." In April of 1993, the Superintendent met with him and in May of 1993, in writing, warned him that his teaching performance was deficient and that he should stop interjecting his religious beliefs into the classroom or the School would take action, yet Mr. Helland continued to ignore the warnings.

After seven years of toleration and attempted accommodation, despite repeated flagrant violations of directives, as a direct consequence of the incident on October 28, 1993, the School was left with no other choice. On November 10, 1993, Mr. Helland was notified by Mr. Hemphill that his name had been removed from the substitute teacher's list "due to not following lesson plans, problems with classroom management and on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation." (Petitioner's Appendix, pp. A-14 through 15)

REASONS FOR DENYING THE WRIT

I. UTILIZING A MIXED-MOTIVE ANALYSIS, THE SCHOOL'S ACTIONS WERE PROPER.

The Petitioner focuses his argument exclusively on the constitutional issues, ignoring the fact that Mr. Helland's refusal to stop interjecting religious activities and speech into the classroom was but one of <u>two</u> reasons for his removal from the substitute teacher's list.

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this matter, the Petition not only omits this warning, but asserts that it never existed.

The other reason, as noted in the Seventh Circuit's opinion, was "that Helland's work as a substitute teacher was subpar." Helland, 93 F.3d at 332. In Mt. Healthy City School District Board of Education v. Fred Doyle, 429 U.S. 274 (1977) this Court held that in a mixed-motive case, where one basis for the decision is lawful and the other unlawful (an alleged constitutional violation), "if the lawful reason alone would have sufficed to justify the firing, the employee could not prevail in a suit against the employer." McKennon v. Nashville Banner Publishing Company, 513 U.S. 352, 115 S.Ct. 879, 885 (1995)(citing Mt. Healthy, 429 U.S. at 284-287).

In the present case, both the Seventh Circuit and the district court specifically found that the School presented and proved two distinct reasons for Mr. Helland's removal from the substitute teacher's list: (1) "that his work as a substitute teacher was subpar;" and, that (2) "he defied repeated warnings against interjecting his religious beliefs into the classrooms." Helland, 93 F.3d at 330. The fact that two reasons were involved make this a mixed-motive case. The Seventh Circuit also specifically found that the lawful reason, Mr. Helland's subpar substitute teaching performance, alone would have justified Mr. Helland's removal from the substitute teacher's list. Id. Based on this finding, under McKennon and Mt. Healthy, Mr. Helland "could not prevail in a suit against the [School]." McKennon, 115 S.Ct at 885 (parenthetical supplied).

This analysis is an initial hurdle that Mr. Helland must overcome prior to even presenting the constitutional issues to this Court. Yet he never even raises the issue in the Petition. Because there is no need to address the constitutional issues relating to Mr. Helland's religious activities in the classroom, as the lawful reason alone justified the removal, the Petition should be denied.

II. THE ACADEMIC FREEDOM ISSUE WAS NOT RAISED IN THE LOWER COURTS AND THUS IS NOT RIPE FOR REVIEW.

In his Petition, Mr. Helland places all of his legal apples in the "academic freedom" basket. He asserts that because he had a First Amendment right to "academic freedom" to interject his religious beliefs into the classroom, the School's actions in discharging him for this activity could not, by definition, be a legitimate non-discriminatory reason under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, this argument suffers from a fatal defect; it was never raised in the lower courts. In Youakim v. Miller, 425 U.S. 231 (1976) this Court stated: "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." Id., 425 U.S. at 234. Because the entire thrust of the Petition is premised upon an argument that was not presented to the lower courts, the Petition should be denied.

III. THE UNIQUE FACTS OF THIS CASE PRECLUDE THE COURT FROM DIRECTLY ADDRESSING THE ISSUES RAISED IN THE PETITION.

Even if this Court were to find that the Free Exercise/Establishment Clause issues are important and properly before this Court, the facts underlying this case make it an inappropriate vehicle for deciding these important issues.

The parties are in agreement that there is a great deal of confusion in the lower courts and in the Nation's primary and secondary schools over the obligations the Establishment Clause imposes on them

to avoid the establishment of a religious viewpoint in the classroom when this concern is balanced with the rights of teachers and students to free speech and the free exercise of religion also guaranteed under the First Amendment. However, despite this confusion, the Respondent respectfully suggests that this is not the appropriate case to resolve those issues.

A. Mr. Helland As A Substitute Teacher.

The primary problem with squarely addressing the issues presented in the Petition is the fact that Mr. Helland is not a regular teacher with the power to create a curriculum and a lesson plan for the class. Rather, Mr. Helland is a substitute teacher. As noted in the School's Substitute Teacher Handbook, Mr. Helland as a substitute teacher was required to "[k]eep the atmosphere of the room as nearly normal as possible by following the regularly scheduled activities and teaching plans." (D. # 22, Resp. to Req. for Adm., No. 29, Substitute Teachers' Handbook, Exh. "DD", p. 10)

This Court's cases discussing the right to "academic freedom," Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967); Wieman v. Updegraff, 344 U.S. 183, 195 (1952)(Frankfurter, J. concurring), do so as a necessary adjunct of the teacher's right to control the curriculum in the classroom. Mr. Helland, as a substitute teacher, had no such right of curricular control. He was required to follow the lesson plans left for him. Therefore concerns over stifling "[t]he classroom [as] peculiarly the `marketplace of ideas'" Keyishian, 385 U.S. at 603 (parenthetical supplied), simply are not raised by the specter of stifling Mr. Helland's speech. The classrooms to which he is assigned are never a marketplace for his ideas. Rather his assigned job is to simply transmit another teacher's ideas to the class through that teacher's prepared lesson plans. Because

Mr. Helland, as a substitute teacher, has no right of curricular control, the academic freedom argument is inapposite. Because the academic freedom issue is inapposite, the Petition should be denied to the extent it seeks to have this Court review the case on that basis.

B. Mr. Helland Was Not Removed For Any Single Isolated Incident, But Rather For The Cumulative Effect Of His Activities Which Improperly Established Religion In The Classrooms In Which He Taught.

In the Petition Mr. Helland focuses on several isolated incidents (carrying the Bible, reading the Bible in class silently, and departing from the assigned lesson plan to discuss creationism in class) and argues that each individually is constitutionally permissible. However, it is not the isolated incidents that caused Mr. Helland to be removed from the substitute teacher's list. Rather it was the cumulative effect of these incidents and a number of others (handing out religious pamphlets in school and in class, discussing specific religious beliefs in class outside of the lesson plan, reading the Bible aloud in class, and his repeated defiance of directive to refrain from this type of conduct) that caused Mr. Helland to become so entangled in religion that ultimately the School had no choice but to remove him from the substitute teacher's list. The Petition utterly ignores this salient fact, seeking to have this Court address each isolated incident in a vacuum and arguing that each incident, in and of itself, does not violate the Establishment Clause, while ignoring the fact that the cumulative effect of all of the activities inextricably entangled the School, through its representative, Mr. Helland, in religious activity, and thus creating an Establishment Clause violation.

Thus even if each of the isolated issues are important ones on which the Court wishes to render an opinion, because Mr. Helland was removed not for any single incident, but rather because of the cumulative effect of his activities, each of the issues raised in the Petition are not squarely presented to the Court and therefore the Petition should be denied to the extent it seeks a ruling on each isolated issue.

IV. THE PETITIONER'S PROPOSED ACADEMIC FREEDOM ANALYSIS IS INAPPLICABLE.

At the heart of his argument, the Petitioner proposes taking the "academic freedom" analysis crafted by this Court for application to professors in colleges and universities and apply it to primary and secondary school teachers who engage in religious speech or activities and find that those activities are protected. See e.g. Keyishian, 385 U.S. at 603 and Wieman, 344 U.S. at 195. The flaw in relying on these cases to support an extension of this proposition into the primary and secondary schools, at least in the context of religious speech, is that this argument utterly ignores several fundamental distinctions between colleges and universities and primary and secondary schools.

With respect to college and university students, this Court has recognized that the danger of an Establishment Clause violation caused by a professor's religious speech and choice of religious curriculum is low. Tilton v. Richardson, 403 U.S. 672, 686 (1971)("There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view . . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the limitations [prohibiting religious instruction]. Furthermore,

by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influences.") See also Widmar v. Vincent, 454 U.S. 263, 274 n. 17 (1981)(Noting that college and university students are young adults and "are less impressionable than younger students."). In contrast, this Court has noted that with primary and secondary school students the danger of an Establishment Clause violation caused by a teacher's religious speech and choice of religious curriculum is high. Grand Rapids School District v. Ball, 473 U.S. 373, 383 (1985)("[T]he government's activities in this area [of religion in the public schools] can have a magnified impact on impressionable young minds.")

This Court discussed the basis for the distinction in detail in Edwards v. Aguillard, 482 U.S. 578 (1987):

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.
>
> 5. The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. "This distinction

> warrants a difference in constitutional results." Thus, for instance, the Court has not questioned the authority of state colleges and universities to offer courses on religion of theology.

Edwards, 482 U.S. at 584 (citations omitted).[11]

The Edwards case thus establishes three reasons for drawing a distinction between religious activities by teachers in primary and secondary schools versus those in colleges and universities: (1) the compulsion imposed due to mandatory attendance laws in primary and secondary schools; (2) the immaturity due to the age of the students involved in primary and secondary school classes; and, (3) the role model status of teachers in primary and secondary schools. Because of these three elements, the balance between a teacher's right to academic freedom and the School's interest in avoiding an Establishment Clause violation almost always tips in favor of the School in the primary and secondary schools context. Thus for example, in Lee v. Weisman, 505 U.S. 577 (1992) this Court held that a school violated the Establishment Clause by presenting an invocation and benediction by a member of the clergy during high school and middle school graduation ceremonies:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and secondary public schools. We do not address whether that choice [to attend the graduation program despite the religious activities] is acceptable if the affected citizens are

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[11] Curiously, the Petitioner's counsel never even cites the Edwards case, despite his familiarity with it as Counsel of Record, and its applicability to this case.

> mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.

Id., 505 U.S. at 587 (parenthetical supplied). In this context the Court also noted that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Id., 505 U.S. at 586-87.

This Court has also noted that the "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and voluntary choice." Grand Rapids School District, supra., 473 U.S. at 390. Thus, contrary to the Petitioner's suggestion, the academic freedom analysis, at least with respect to religious speech, is limited by this Court's prior decisions to young adults in colleges and universities where a right to academic freedom overrides Establishment Clause concerns. It should not and can not, consistent with the above referenced cases, be applied to the Nation's primary and secondary schools because Establishment Clause concerns outweigh those rights in the lower schools. The Seventh Circuit's ruling is consistent with this proposition, and the Petition should be denied.

V. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Not only is the Seventh Circuit's decision consistent with this Court's rulings in this area, it is also consistent with the decisions of each of the other circuits to address the issue.[12] For example, applying the principles created by this Court in the cases cited in the preceding subsection, the Ninth Circuit in Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994) upheld the defendant school's decision to prohibit the teacher from discussing creationism and other religious matters in the classroom as well as its direction to him to "refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time . . . ." Id., 37 F.3d at 522. The Ninth Circuit reasoned:

> While at the high school, whether he is in the classroom or outside of it during the contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable

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[12] The Petitioner cites the Fifth Circuit case of Doe v. Duncanville Independent School District, 70 F.3d 402 (5th Cir. 1995), for the proposition that there is a conflict. This is untrue. The Petitioner simply ignores pages 406-407 of the opinion where the Fifth Circuit held that pre-basketball game prayers led by a teacher and coach constituted an impermissible Establishment Clause violation. The court did permit the school choir to retain its religious theme song, **The Lord Bless You and Keep You**, because it found that 60% to 70% of serious choral music was based on sacred themes or text and that there was a secular purpose to this song. Id., 70 F.3d at 407. The citation to Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985) is similarly inapposite, as the court specifically noted that "[t]he central theme of the novel is life, especially racism, from the perspective of a teenage boy in a working class black family. Comment on religion is a very minor portion of the book. Its primary effect is secular." Id., 753 F.2d at 1534. The citation to Florey v. Sioux Falls School District, 49-5, 619 F.2d 1311 (8th Cir. 1980) is also inapposite as that case dealt with secular materials, i.e. Christmas carols, and did not discuss the use of religious materials as part of a school's curriculum. However, even if it did, the question here is not whether religious materials may be used as part of a school created curriculum, the question here is whether a teacher may depart from the school's curriculum to interject his own religious materials or comments. The circuits are unanimous that a teacher may not do this.

> because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Peloza, 37 F.3d at 522. Mr. Helland's discussions, including the October 28, 1993 creationism discussion suffer from the same defects.

In Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), the Tenth Circuit addressed the issue of whether a school could prohibit a teacher from silently reading a Bible at his desk and keeping a copy of the Bible on his desk during class time as the least restrictive means of meeting its compelling interest in avoiding the endorsement of a particular religion. In finding that the school could do so, the Ninth Circuit noted:

> We believe that the district court also properly concluded that Mr. Robert's actions, when viewed in their entirety, had the primary effect of communicating a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class.
>
> > The meaning of a statement to its audience depends both on the intention of the speaker and on the `objective'

> meaning of the statement in the community . . . . If the audience is large, as it always is when government `speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the `objective' content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Lynch, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring). Here, it is reasonable to conclude that not all of Mr. Roberts' students would receive a purportedly secular message. Mr. Roberts left his personal Bible on his desk in his fifth-grade classroom at all times and read it during class time. Like his Bible, the two other contested books were Mr. Roberts' personal property and were not used as part of the class curriculum. Further, the three books were the only books in the classroom that were demonstrated to contain religious themes; all three pertained to Christianity. Considering these factors in light of the environment of a fifth-grade classroom, the district court properly concluded that the books had the primary effect of advancing religion. See Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577-78, 96 L.Ed.2d 510 (1987) (noting that elementary schoolchildren `are impressionable and their attendance is involuntary').

When viewed from the eyes of the children in Mr. Roberts' class, the placement of the two books in the class library, the placement of Mr. Roberts' Bible on his desk, and Mr. Roberts' reading of the Bible during the reading period provided `a crucial symbolic link between government and religion.' Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385, 105 S.Ct. 3216, 3223, 87 L.Ed.2d 267 (1985).

Under both the purpose and the effect prongs of the Lemon test, the district court properly determined that the censored actions, when viewed in their entirety, violated the Establishment Clause of the First Amendment. The censored conduct therefore substantially infringed on the rights of Mr. Roberts' students.

12. In Engel v. Vitale, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962), the Supreme Court recognized that `[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' Such coercive pressure is surely at its peak when the religious minorities are impressionable children who look to their teacher as a role model.

Because `[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate

> religion,' Lemon, 403 U.S. at 619, 91 S.Ct. at 2114, we conclude that the school district's actions were not constitutionally infirm.

Roberts, 921 F.2d at 1057-58. See also Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991). Mr. Helland's conduct was no different and was found by the Seventh Circuit to fail constitutional protection for the same reasons. There is clearly no conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

May 20, 1993

Peter Helland
P.O. Box ~~352~~ 382
Notre Dame, IN 46556

Dear Mr. Helland:

This letter is written as a follow-up to our conversation of Wednesday, April 14, 1993, with regard to your activity as a substitute teacher with the South Bend Community School Corporation.

I have taken the opportunity to review your file for the time that you have worked for us as a substitute teacher. The file shows that on numerous occasions building principals and teachers have indicated that you have not followed lesson plans and that your classroom management left something to be desired. Also, on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation.

Since you have been a substitute with the South Bend Community School Corporation for some time, I am sure that you understand the need to follow the guidelines for employment as a substitute. Those are contained in the handbook for substitute teachers. If you have not reviewed this handbook, we can make a copy available to you.

More importantly, you have consistently received poor performance reviews from the individuals for whom you have

substituted. Those negative performance evaluations certainly give us some cause as to your continued use as a substitute teacher.

To this date, it is my understanding that you continue to be on the substitute list. However, you need to be apprised that a number of staff this year alone have requested that you do not return to their particular building. I cite no less than five different requests this school year from three different schools that you not return as a substitute.

Please take the time to review the substitute handbook.

Sincerely

/s/

Ralph Komasinski
Acting Superintendent of Schools